Petition

81-1817

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC, AND BOSTON LODGE 264, DISTRICT 38, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Petitioners,

vs.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c) ("UMTA") and ("§ 13 (c)"), creates binding federal rights.

2. Whether a state may pass laws nullifying the rights created by §13(c).

3. Whether a state may, consonant with the Contract Clause, U.S. Const., Art. I §10, pass legislation impairing rights set forth in Agreements mandated by §13(c) and collective bargaining agreements. 1/

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1. The parties to this action are:
   1. Massachusetts Bay Transportation Authority
   2. Commonwealth of Massachusetts
   3. Division 589, Amalgamated Transit Union, AFL-CIO-CLC
   4. Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers, AFL-CIO

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IN THE

Supreme Court of the United States

October Term, 1981

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC, AND BOSTON LODGE 264, DISTRICT 38, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Petitioners,

vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINION BELOW

The opinion of the district court (App., p. A1) is reported at 511 F. Supp. 312 (D. Mass. 1981); the clarification and reconsideration opinion of the district court (App., p. B1) is not reported. The opinion of the court of appeals (App., pp. C1, D1) is not reported. The opinion of the court of appeals denying rehearing (App., p. E1) is not reported.

JURISDICTION

The court of appeals order denying rehearing and reconsideration was entered October 23, 1981. On January 12, 1982, Justice Brennan entered an order extending the time to petition for a writ of certiorari to March 22, 1982. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Jurisdiction of the district court rested on 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

49 U.S.C. § 1609(c) provides:

> It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bar-

> gaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Ch. 405, Mass. Stat. 1978, is set forth at App., p. A21.

Ch. 581, Mass. Stat. 1980, is set forth at App., p. A30.

U.S. Const., Art. I, § 10, provides:

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .

STATEMENT OF THE CASE

I. Facts Regarding The Transit Union

Division 589, Amalgamated Transit Union, AFL-CIO ("Transit Union"), is an unincorporated labor organization representing transit employees. From 1912 through 1947, the Boston Elevated Railway, a private transit company operated in Boston, Massachusetts, and the Transit Union was the transit employees' chosen collective bargaining representative. From 1936 to 1947, the parties' labor relations were subject to the National Labor Relations Act, as amended, 49 Stat. 449, 61 Stat. 136, 29 U.S.C.

§ 151, *et seq.* ("NLRA"). In 1947, the Metropolitan Transit Authority (MTA), a public entity, purchased the Boston Elevated Railway. Section 19 of the MTA enabling act, Mass. Gen. Laws, Ch. 161A §19, empowered the MTA Trustees to bargain collectively and arbitrate with the employees, which the MTA did, continuously.

In 1964, Congress enacted the Urban Mass Transportation Act, 49 U.S.C. §§ 1601, *et seq.* ("UMTA"). Section 13(c) of the UMTA, which is at issue here, provides:

> It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

In 1964, in order to take advantage of the available federal funds, the Massachusetts legislature converted the MTA to the Massachusetts Bay Transportation Authority

("MBTA"). Mass. Gen. Laws Ann. Ch. 161A. Under Ch. 161A, § 19, the MBTA was authorized and directed to:

> bargain collectively with labor organizations representing employees of the authority and to enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowance of such employees. The employees of the authority shall submit all grievances and disputes pursuant to arbitration provisions in agreements existing at the time of the creation of the authority or subsequently entered into with the authority.

Massachusetts also amended its transit law so that the MBTA could "take all necessary action to secure any federal assistance which is or may become available . . . for any of the purposes of this chapter" by providing that, regardless of the substantive provisions of the state law, state law was to be subordinated to the federal law:

> . . . It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter. (Mass. Gen. Laws Ann. ch. 161A, § 29 (1976).

Thereafter, the MBTA began to apply for federal UMTA assistance. When a grant applicant applies for federal assistance, the Secretary of Labor, to effectuate the Act, notifies the union representing employees of the application and advises the applicant and the union to meet to negotiate a labor protection agreement ("§ 13(c) agreement"). 29 C.F.R. § 215. The Secretary of Labor reviews the agreement reached, and, if he concludes that the agreement effectuates § 13(c), so certifies to the Secretary of Transportation. *Id.*

Accordingly, the MBTA and the Transit Union have concluded a series of labor protective agreements ("§ 13(c) Agreements"). Each § 13(c) Agreement has been applied to many projects undertaken over a period of years. The most recent full § 13(c) Agreement was signed in December, 1974; the MBTA recommitted to the 1974 § 13(c) Agreement on the occasion of each of many federal grants rereceived since that time, most recently, in 1978, six months before the events at issue here.

From the outset, and until six months before the events in question, all provisions of the § 13(c) Agreements regarding the questions here were essentially identical. The § 13(c) Agreements provide that: (1) All rights, privileges and benefits of employees under existing collective bargaining agreements shall be preserved and continued unless changed through the processes the collective bargaining agreements provide; (2) There shall be arbitration of labor disputes, including disputes over the terms to be included in a collective bargaining agreement (commonly known as "interest" arbitration). The procedures for arbitration are to be taken from any then applicable collective bargaining agreement; (3) Any extant right to bargain, including the right to arbitrate labor disputes, will be preserved and continued.

At the time the 1974 § 13(c) Agreement was concluded, the Transit Union and the MBTA were, as already noted, also parties to a collective bargaining agreement setting forth wages, hours and working conditions ("Basic Agreement"). The Basic Agreement provides that the parties to it will bargain collectively over all questions, upon timely notices of change proposals, the parties will bargain for changes in the Basic Agreement, and, should bargaining fail, the parties will arbitrate over the changes before a tripartite board, with the neutral arbitrator experienced in transportation.

At the beginning of 1978, the Basic Agreement was opened up for changes. The MBTA and the Transit Union could not agree about the changes they had separately proposed. The Transit Union sought arbitration, and the MBTA began to prepare for arbitration. In July, the Massachusetts legislature enacted a statute (Ch. 405, Mass. Stat. 1978) amending § 19 of Ch. 161A to limit the MBTA authority to arbitrate.[2]

The MBTA insisted upon following the terms of the new statute. At the same time, the MBTA also applied to the federal government for another grant of federal funds and committed itself afresh to the labor protections set forth in the § 13(c) Agreements.

The United States Department of Labor was advised of the alteration in state law. The Assistant Secretary of Labor determined that there existed a dispute about the meaning of the § 13(c) Agreements and suggested that the MBTA and the Transit Union use the arbitration provision of the § 13(c) Agreements to seek an interpretation. They duly submitted the dispute to arbitration, and the arbitrator ruled that:

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[2] Briefly, Ch. 405, Mass. Stat. 1978, required that the parties complete a period of mediation before arbitration could take place. The arbitration itself was to be conducted before a single arbitrator who resided in the Commonwealth of Massachusetts and was "experienced in state and local finance." The arbitrator was required to consider "primarily" several specific criteria, traditionally management arguments, which emphasize the financial condition of the MBTA and to discuss the applicability of the new criteria to his award. The statute also precludes an arbitrator from awarding certain cost-of-living protections which have been awarded and used by the parties in arbitration and bargaining.

> "The July 10, 1978 amendments to Section 19 of Chapter 161A of the General Laws, and the M.B.T.A.'s insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the preexisting 13(c) Agreements executed by the parties."

The arbitrator based his ruling on several grounds: He rejected at the outset the MBTA contention that language in the § 13(c) Agreements themselves meant that the federal § 13(c) protections were subordinate to everchanging doctrines of state law (including, of course, the most recent alteration in Massachusetts law). Having found that the § 13(c) Agreements by their terms, created stable, overriding federal protections, the Arbitrator then ruled that those stable § 13(c) rights required arbitration irreconcilably different from the new state scheme. He concluded:

> The Union correctly argued that the overall effect of Section 19F and G of Chapter 161A [Ch. 405, Mass. Stat. 1978], was to provide management with an advantage in any interest arbitration while disadvantaging the employees.

Thereafter, the Transit Union filed this action to compel compliance with the Arbitrator's Award and the federal law.

Meanwhile, the arbitrator having resolved the dispute over whether the § 13(c) Agreements by their terms subordinated employee rights to everchanging doctrines of state law, the Department of Labor demanded that, as a condition of the receipt of federal funds, the MBTA must abide by the § 13(c) Agreement protections, as thus interpreted. In response thereto, the MBTA agreed that in order to get its ongoing federal money,[3] it would abide by the arbitrator's award until it obtained a reversal or vacating of that award in any jurisdiction.

In 1980, the situation changed again. The Massachusetts State Legislature passed a second statute, repealing in large part the MBTA's statutory authority to bargain collectively at all and further restricting its ability to arbitrate. The MBTA then revealed that it did not intend to abide by its representations to the Labor Department and would not bargain or arbitrate except under the extremely restrictive terms of the Massachusetts statutes.

The 1980 Massachusetts law (Ch. 581, Mass. Stat. 1980) forbids the Directors of the MBTA to bargain or agree with representatives of a union on a number of established, traditional employment conditions, including assignments, discharges, the employment of part-time employees, compensation for overtime. The law allots those subjects to the unilateral discretion of management. Chapter 581, Mass. Stat. 1980, also amends Ch. 405, Mass Stat. 1978, which restricted interest arbitration. Ch. 581, Mass. Stat. 1980, precludes the Arbitrator from including in a collective bargaining agreement those subjects precluded from bargaining under the new law. Finally, Ch. 581, Mass. Stat. 1980, explicitly repeals the state's authority under Ch. 161A § 29, Mass. Gen. Laws, *supra,* p. 5, to subordinate conflicting state law to the federal law.

After filing suit in 1979 over Ch. 405, Mass. Stat. 1978, the MBTA and the Transit Union had negotiated a settlement of the changes in the Basic Agreement to be binding until 1980, although they did not agree to settle the 1979 litigation. In 1980, the MBTA and the Transit Union again reached impasse over the changes in the Basic Agreement, and as set forth above, the MBTA refused to arbitrate unrestricted by Ch. 581, Mass. Stat. 1980. Accordingly, the Transit Union filed an amended complaint, seeking an injunction to compel unrestricted arbitration and other relief.

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[3] The MBTA gets regular federal operating assistance, as well as funding for various capital projects.

On March 17 and 20, 1981, the district court granted in part and denied in part preliminary injunctive relief to compel arbitration of changes in the Basic Agreement on all subjects (App., p. A1). On May 15, 1981, the court further explained some of its holdings. (App., p. B1). All parties appealed.

On September 30, 1981, the court of appeals reversed, and ordered the district court to vacate the injunction. The court of appeals ruled that, in passing UMTA, requiring the conclusion of federal labor protective arrangements as a condition of the receipt of federal funds, Congress did not manifest its intent to preclude the states from abrogating the arrangements it required. Accordingly, that court continued, states are free to pass legislation impairing the § 13(c) Agreements, required by federal law, without violating either § 13(c) or the Contract Clause of the United States Constitution, Art. I, § 10. The court of appeals concluded, too, that where the parties before the court dispute the necessity of state legislation impairing contracts, the courts should not entertain a Contract Clause challenge, but should defer to the judgment of the state legislature.

Three weeks later, on October 23, 1981, the court below denied the Transit Union's Petition for Reconsideration, while noting that nullification of UMTA agreements should take place only where there was a particularly strong state statute and an "ambiguous" § 13(c) federal obligation. (App., p. E1).

II. Facts Regarding the Machinists Union

Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers, AFL-CIO ("the Machinists Union"), is an unincorporated association doing business in Massachusetts as a labor organization lawfully recognized for collective bargaining purposes by the Massachusetts Bay Transportation Authority (hereinafter referred to as "the MBTA") as representative of machinists in several classifications employed by the MBTA.

The Machinists Union joins the Transit Union as a petitioner herein. The Machinists Union was a party to the litigation in this matter in the United States District Court as a plaintiff-intervenor and in the United States Court of Appeals for the First Circuit as an appellee where it also joined in the brief and argument of the Transit Union.

The claims of the Machinists Union are the same as those asserted herein by the Transit Union. The claims of both unions are asserted under Section 13(c) of the Urban Mass Transportation Act of 1964 (UMTA), 49 U.S.C. § 1609(c), the "13c agreement" executed by the MBTA in 1974 and the contract clause of the United States Constitution, Article I, Section 10. Further, the Machinists Union is a party to the same 1974 13c agreement with the MBTA as is the Transit Union.

For the purposes of this petition the only factual difference between the Machinists Union and the Transit Union lies in their respective collective bargaining agreements with the MBTA. The Machinists Union's last collective bargaining agreement with the MBTA was for the period

January 1, 1976 to December 31, 1977 and from year to year thereafter; like the Transit Union's last such agreement with the MBTA, it also pre-dates the enactment of the state acts whose constitutionality is tested herein.

REASONS FOR GRANTING THE WRIT

The decision below wrongly decides another facet of a question already before the Court in *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority*, 650 F. 2d 1379 (6th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3347 (No. 81-411). As the grant of certiorari in *Jackson* demonstrates, that question — the status of the agreements mandated by § 13(c) of the Urban Mass Transportation Act, 49 U.S.C. § 1609, as a precondition to the grant of federal monies to public transit authorities — is of national importance. In *Jackson*, the Sixth Circuit concluded that § 13(c), a federal statute, creates binding rights enforceable in federal court.[4]

In seeking a writ of *certiorari*, the *Jackson* Petitioners strenuously contended that the decision in the instant case — that, in enacting § 13(c), Congress did *not* create federal rights binding on the states — conflicted with the Sixth Circuit's ruling and that this conflict required Supreme Court resolution. (See, particularly, Supplemental Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeal for the Sixth Circuit, filed in *Jackson* solely for the purpose of invoking the conflict between this case and *Jackson* as grounds for this Court's review in *Jackson.*) *Amici curiae* in *Jackson* also called this Court's attention to the inconsistency between this case and *Jackson.* (Brief of *Amicus Curiae,* American Public Transit Authority, in Support of Petitioner's in *Jackson, supra,* pp. 8, 22; Brief of *Amicus Curiae,* National Institute of Municipal Law Officers, in support of Petitioners in *Jackson,* p. 13). Indeed, the First Circuit here relied entirely upon the contention, set forth to this Court in the *Jackson* Petitioners' brief, that the legislative history of § 13(c) reveals that Congress intended to create a federal structure not binding on the states.[5]

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[4] *Accord, Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority*, 650 F. 2d 1389 (6th Cir. 1981); *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 872 (1979); *Division 1447, Amalgamated Transit Union* v. *Louisville and Jefferson County Transit Authority*, No. 80-3203 (6th Cir. 1981), *Petition for Cert. filed*, 50 U.S.L.W. 3376 (No. 81-804) (App., p.——); *Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility*, 585 F. 2d 1340 (7th Cir. 1978) and *Division 587, Amalgamated Transit Union* v. *Municipality of Metropolitan Seattle*, No. 80-3532 (9th Cir. 11/22/81), *reh. denied*, 2/12/82. (App., p. ——).

In fact, the language and legislative history of § 13(c) are just to the opposite; for purposes here, the most significant point is that Congress understood that § 13(c) imposes binding federal obligations on those who choose, by taking federal money, to come within its terms. (See, Brief of Respondent, Division 1285, Amalgamated Transit Union, in *Jackson, supra,* pp. 13-24).

In *Jackson,* there was no state law purporting to override the federal law enacted by § 13(c). Here, there is such a state law. Thus this case raises the additional question of whether, assuming that § 13(c) conditions are enforceable, the states may nonetheless nullify those rights. On that further question, the decision below is contrary to the opinions in *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (8th Cir. 1978), *cert. denied*, 99 S. Ct. 872 (1979) ("Kansas City") and *Division 1447, Amalgamated Transit Union* v. *Louisville and Jefferson County Transit Authority*, No. 3203 (6th Cir. 1981), *Petition for Cert. filed*, 50 U.S.L.W. 3376 (No. 81-804) ("Louisville").[6] In seeking a writ of certiorari from the Sixth Circuit decision enforcing § 13(c) in *Louisville*, that Petitioner also relied upon the alleged inconsistency between *Louisville* and *Kansas City,* on the one hand and *Boston* on the other. Petitioner for Certiorari, *Louisville, supra,* pp. 7-15.

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[5] See Brief of Petitioners, Jackson Transit Authority, *et al.,* in *Jackson, supra,* pp. 27, 39, 43, wherein Petitioners contend that the preservation of collective bargaining agreements in the § 13(c) Agreement there is either transitory, unenforceable, or devoid of any legal content other than state law would provide.

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[6] In *Louisville*, having failed to obtain dismissal on jurisdictional grounds, the transit authority asserted that it had discovered that Kentucky common law precluded it from complying with the § 13(c) Agreements it had concluded repeatedly over the years as a condition of the receipt of federal funds. The District Court rejected this contention, ruling that obligations under § 13(c) are created by federal, not state, law, and refused to nullify the federal contracts. The Court of Appeals affirmed that decision.

The transit authority in *Kansas City* made essentially the same contentions as in *Louisville; i.e*, that newly discovered doctrines of state law could be applied to invalidate ten years of commitments to federal conditions. The Court of Appeals there held:

> We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy the benefits of such bargaining including arbitration. We think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy. (*Kansas City, supra,* 582 F. 2d at 452-3).

The decisions in *Kansas City* and *Louisville* follow an unbroken line of decisions in this Court since *State of Oklahoma* v. *Civil Service Commission,* 330 U.S. 127, 143 (1947), holding that when Congress imposes conditions on the receipt of federal funds, the states accepting the monies are bound to the conditions and may not enact or apply directly conflicting state law to abrogate them. *Ivanhoe Irrigation Dist.* v. *McCracken,* 357 U.S. 275, 295 (1957); *King* v. *Smith,* 392 U.S. 309, 333 (1968); *Thorpe* v. *Housing Authority of City of Durham,* 393 U.S. 270 (1969); *Townsend* v. *Swank,* 404 U.S. 282 (1971); *Carleson* v. *Remillard,* 406 U.S. 598 (1972). *Accord, Pennhurst State School* v. *Halderman,* 451 U.S. 1 (1981).

That line of authority, of course, follows from the understanding of the Supremacy Clause first stated in *Gibbons* v. *Ogden,* 9 Wheat [22 U.S.] 1(1824), that, where directly conflicting state law is concerned, the Supremacy Clause mandates federal supremacy. This case does not, as the First Circuit supposed, present the very difficult question of whether Congress intended to occupy the whole field of collective bargaining with regard to federal UMTA grant recipients. *Compare, San Diego Building Trades Council, Etc.* v. *Garmon,* 359 U.S. 203 (1959). Rather, here, the only question is whether § 13(c), where it applies, overrides state law nullifying employee rights set forth in § 13(c) agreements and related collective bargaining agreements. The settled rule is that, unless Congress specifies otherwise, the Supremacy Clause always requires an inconsistent state law on a subject covered by federal law to give way. *DeCanas* v. *Bica,* 424 U.S. 351 (1976); *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142-143 (1963). *See,* most recently, *Maryland* v. *Louisiana,* 101 S. Ct. 2114, 2129 (1981). The court below fell into error by misunderstanding the foregoing decisions as requiring a specific showing that Congress not only intended federal law to apply but also a showing that Congress intended federal law to prevail over inconsistent state law.[7]

Moreover, since the unprecedented ruling this case, the Virginia legislature has enacted a law, like the Massachusetts law, directed at abrogating the § 13(c) agreements concluded in exchange for federal funds,[8] and state legislatures in Tennessee, Georgia and Maryland are considering such legislation.[9] A resolution of the question whether the states may first take the money and then walk away from fulfilling the obligations undertaken as a condition of obtaining that money is thus essential, so that thousands of transit workers and their employers around the country will know what their obligations are and whether they must abide by them.

The decision below also wrongly decides the Contract Clause question. Chapters 405, Mass. Stat. 1978, and 581, Mass. Stat. 1980, are undeniably directed at the impairment of the Union's § 13(c) Agreements with the MBTA. Even the First Circuit acknowledged that the § 13(c) Agreements were legal contracts at the time they were concluded (App., p. D3, n.2) and that these statutes conflict with the rights established in those contracts (App., p. D19). The Contract Clause prohibits such impairments. *U.S. Trust Co. of New York* v. *New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel* v. *Spannaus*, 438 U.S. 234 (1978). It is the Constitution--not the statute—which is the ultimate source of and defines the extent of protections for the agreements. *See, Logan* v. *Zimmerman Brush Company, et al.*, —— U.S. ——, 50 U.S.L.W. 4247, 4250 (1982).

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[7] Even assuming this Court *were* to require a search of legislative history to decide whether § 13(c) forbade a state to take the federal money and follow a conflicting state policy, as set forth in *Jackson,* the history of § 13(c) plainly reflects that intent.

[8] Ch. 18, §§ 56-530, Va. Code. (1981).

[9] Tennessee: H.D. 2188 and S.B. 2132 (pending); Georgia: H.B. 55 (pending); Maryland: S. 167 (pending).

The court of appeals ruled that § 13(c) must be read to permit such an impairment. However, absent strong contrary indicia, federal statutes are presumed to avoid Constitutional doubts. *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979); *Greene* v. *McElroy*, 360 U.S. 474 (1959). Section 13(c) which is silent on the subject, should be interpreted to avoid such doubts.

Finally, as set forth above, the court of appeals having ruled that, in enacting § 13(c), Congress contemplated no Contract Clause rights, it did not actually decide whether the state legislation would have impaired the § 13(c) Agreement, in violation of the Contract Clause. However, in dealing with a related question—whether the legislation impaired the Basic Agreement in violation of the Contract Clause—the court also held, directly contrary to the plain mandate of *U.S. Trust* and *Allied Structural Steel*, that it would not review the necessity and reasonableness of the state legislation, but would, instead, defer to the judgment of the state legislature (App., p. D53), and in this, too, the court erred.

CONCLUSION

For the above stated reasons, a writ of *certiorari* should be granted.

Respectfully submitted,

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Appendix

81-1817

No. ——

Supreme Court, U.S.
FILED
MAR 22 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC, AND BOSTON LODGE 264, DISTRICT 38, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Petitioners,

vs.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Respondents.

APPENDIX TO PETITION

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LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, et al., Plaintiffs,

v.

The COMMONWEALTH OF MASSACHUSETTS, et al., Defendants.

Civ. A. No. 79-2058-S.

United States District Court,
D. Massachusetts.

March 17, 1981.

Unions brought action against Commonwealth and against transportation authority seeking declaration of unconstitutionality of act affecting arbitration procedures between the union and the authority and seeking injunctive relief. The District Court, Skinner, J., held that: (1) legislative act was effective to amend and add to collective bargaining agreement between transportation authority and unions requirements that neutral arbitrator in tripartite arbitration was to be legal resident of state and was to be experienced in state and local finance, that arbitrators rely "primarily" on eight enumerated factors in determining award, that cost-of-living adjustment awards be limited, that arbitrators inquire into financial capacity of transportation authority, and that awards could be enforced against appropriate legislative or appropriating body; however, tripartite arbitration procedure was central consideration of preexisting collective bargaining agreements, and thus statutory and constitutional prohibitions against abridgement of contract barred effectiveness of legislative enactment purportedly imposing arbitration by single arbitrator; (2) authority of transportation authority to lay off members of first union upon running out of money was subject to binding arbitration under collective bargaining agreement, which included flat prohibition against layoffs; and (3) second union was not entitled to preliminary injunction preventing layoffs ordered following expiration of collective bargaining agreement where union members to be laid off had, under previously negotiated collective bargaining agreement, no contract right to job security and no reasonable expectation of job security until they had worked 30 months.

Order accordingly.

1. Federal Courts —41

Where jurisdiction of district court has properly been invoked, the court is obliged to act in absence of compelling reasons of comity and practicality.

2. Federal Courts —58

District court would exercise jurisdiction over union's action against Commonwealth and transportation authority seeking declaration of unconstitutionality of act affecting arbitration procedures between the union and authority and seeking injunctive relief, despite claim that court should abstain.

3. Estoppel —62.2(2)

Transportation authority was estopped to deny continuation in force of collective bargaining agreement, even though notices served by the authority and by union had cut off the "year-to-year" extended term under most recent contract, where both union and transportation authority had treated agreement as continuing in force.

4. Constitutional Law —120

State may impair obligation of public body only with respect to some aspect of contract which was not central to reasonable expectations of contracting parties, and then only if impairment is reasonable and necessary in furtherance of valid state policy. U.S.C.A.Const. Art 1, § 10, cl. 1.

5. Constitutional Law —120

Legislative act was effective to amend and add to collective bargaining agreement between transportation authority and unions requirements that neutral arbitrator in tripartite arbitration was to be legal resident of state and was to be experienced in state and local finance, that arbitrators rely "primarily" on eight enumerated factors in determining award, that cost-of-living adjustment awards be limited, that arbitrators inquire into financal capacity of transportation authority, and that awards could be enforced against appropriate legislative or appropriating body; however, tripartite arbitration procedure was central consideration of preexisting collective bargaining agreements, and thus statutory and constitutional prohibitions against abridgement of contract barred effectiveness of legislative enactment purportedly imposing arbitration by single arbitrator. Urban Mass Transportation Act of 1964, § 13(c), 49 U.S. C.A. § 1609(c); U.S.C.A.Const. Art. 1, § 10, cl. 1.

6. Labor Relations —434.8

Authority of transportation authority to lay off union members upon running out of money was subject to binding arbitration under collective bargaining agreement, which included flat prohibition against lay-offs.

7. Labor Relations —967

Union was not entitled to preliminary injunction preventing layoffs ordered following expiration of collective bargaining agreement where union members to be laid off had, under previously negotiated collective bargaining, no contract right to job security and no reasonable expectation of job security until they had worked 30 months. Urban Mass Transportation Act of 1964, § 13(c), 49 U.S.C.A. § 1609(c).

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Joseph H. Elcock, Gen. Counsel, M.B.T.A., Dwight Golann, Asst. Atty. Gen., Boston, Mass., for defendants.

MEMORANDUM AND ORDER ON MOTIONS FOR PRELIMINARY INJUNCTIONS

SKINNER, District Judge.

I. *STATEMENT OF THE CASE AND PRELIMINARY FINDINGS OF FACT*

In this action the plaintiff, Local Division 589, Amalgamated Transit Union ("Transit Union") seeks declaratory and injunctive relief against the Massachusetts Bay Transportatoin Authority ("MBTA") and its Chairman of the Board, and also against the Commonwealth of Massachusetts in the following respects:

a. A declaration that chapter 405 of the Massachusetts Acts of 1978 (M.G.L. c.161A §§ 19 and 19C—G) (hereinafter "c.405") is not effective to alter the procedure for interest arbitration[1] contained in the Transit Union's collective bargaining agreement.

b. A mandatory injunction requiring the MBTA to proceed immediately to interest arbitration in accordance with the Transit Union's collective bargaining agreement.

c. A declaration that chapter 581 of the Massachusetts Acts of 1980 (hereinafter "c.581") purporting to prohibit the MBTA from entering into collective bargaining on a number of particular issues is invalid.

d. An injunction prohibiting the laying off of approximately 500 members of the Transit Union which is scheduled to become effective on Saturday, March 21, 1981.

Boston Lodge 264 of District 38, International Association of Machinists and Aerospace Workers (hereinafter "Machinists' Union") has been allowed to intervene on behalf of machinists employed by the MBTA, 58 of whom are scheduled to be laid off on March 21. The Massachusetts Bay Transportation Authority Advisory Board (hereinafter "Advisory Board") has appeared and argued in opposition to the positions of the plaintiff and the intervenor. The Machinists' Union takes the same position as the Transit Union, except that with respect to lay offs it asserts protection under its contract which the Transit Union does not claim. It also seeks arbitration with respect to the lay off of its 53 members.

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[1] "Interest arbitration" is arbitration over the terms of proposed collective bargaining agreement, as opposed to "grievance arbitration", which is arbitration of specific disputed under the terms of an existing agreement.

The claims of the two unions are asserted under section 13(c) of the Urban Mass Transportation Act of 1964 ("UMTA"), 49 U.S.C. § 1609(c), the "13(c) agreement" executed by the MBTA in 1974 and the contract clause of the United States Constitution, Art. I, section 10.

In July of 1980 the Transit Union initiated collective bargaining under the then-current provisions of its collective bargaining contract. Negotiations continued until the end of September 1980 without success. As provided in the collective bargaining agreement the parties then proceeded to interest arbitration in the manner specified in the agreement. Thereafter the MBTA refused to participate in the selection of the third arbitrator and asserted that it was without authority to arbitrate except in accordance with c.405 of the Acts of 1978. The matter was referred to the Secretary of Labor, who apparently took the position that the contract procedure was in force by reason of section 13(c). There was apparently some further backing and filling, but as of November the parties were at a stand-off: the MBTA was willing to arbitrate only in accordance with c.405 and the unions were willing to arbitrate only in accordance with the collective bargaining agreement.

In November of 1978, the MBTA ran over its budget. The Governor exercised purported emergency powers to keep it running. In the course of the legal and legislative flurry that followed, the legislature enacted c.581 of the Acts of 1980. The Advisory Committee thereafter approved a budget for 1981 for the MBTA which was $7 million less than that for the previous year. The MBTA has scheduled cuts in service and the lay offs above referred to purportedly in an effort to reduce its expenses to the budgeted level.

II. *JURISDICTION*

Argument as to jurisdiction is foreclosed by the decision of the Court of Appeals in *Local Div. No. 714, etc.* v. *Greater Portland, etc.*, 589 F. 2d 1 (1st Cir. 1978), as is argument as to the existence of a claim upon which relief can be granted. In that case it was held that the union had the right to enforce the terms of section 13(c) of UMTA, which meant in effect the terms of the agreement entered into in compliance with that statute. The Court recognized that by reason of the authority delegated to the Secretary of Labor the agreement might well impose requirements on a transit authority broader than the minimum requirements specified in the statute. Accordingly, the terms of the agreement are the primary source of rights and liabilities, to which the statute and its legislative history provide only the most general guide.

III. *ABSTENTION*

The defendants and the Advisory Board all urge this court to abstain because of the pendency in the state courts of several actions relating to some of the same subjects. One of these cases is *MBTA* v. *Adams,* in the Supreme Judicial Court for Suffolk County, No. 79-388 Civil. That case was removed to this court but was remanded for lack of removal jurisdiction because the plaintiff could not have originated the case in this court. (Memorandum and Order, C.A. 79-2059-S). *MBTA* v. *Adams* is an action to set aside an "award" of an arbitrator which consists of a legal ruling that c.405 is invalid and ineffective to alter the arbitration procedures contained in the collective bargaining agreement. *MBTA* v. *Adams* could be resolved in terms of the arbitrator's authority with consideration of the underlying federal questions. The second case is *Local 589, etc. et al.* v. *MBTA, Suffolk Superior Court,* C.A. No. 45919. That case has so far been concerned with the parties' rights under the extension period of the collective bargaining agreement in the light of c.581 of the Acts of 1980, although the complaint contains a reference to the contract clause of the Constitution, Art. I, section 10. The case has not been concerned with the effect of section 13(c)of UMTA or the 13(c) agreement.

[1, 2] Where the jurisdiction of the court has properly been invoked, this court is obliged to act in the absence of compelling reasons of comity and practicality. While state law does underlie the resolution of this case, as far as I can determine there are not any significant questions concerning state law at issue in the state cases, the resolution of which will aid in the decision of this case.[2] In these circumstances abstention is at best a discretionary matter. *Puerto Rico International Airlines, Inc.* v. *Silva Recio,* 520 F. 2d 1342, 1345 (1st Cir. 1975). One of the issues to be considered in the exercise of discretion is the exigency of the issue to be decided. It is clear that significant arbitration necessary to resolve the current labor dispute affecting this critical transit system will not proceed until the federal questions are resolved. This does not strike me as the time for an elegant game of jurisdictional shuttlecock. *Cf. England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 440 (1964). Accordingly, I shall proceed with an attempt to resolve the federal questions.

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[2] None of the parties disagree about the meaning of the state statutes involved; they disagree about the effect of those statutes on existing contracts and their interrelation with federal law.

IV. *THE COLLECTIVE-BARGAINING AGREEMENT*

Section 13(c) of UMTA and the agreement thereunder are essentially preservative rather than creative of contract rights, as is the contract clause of the Constitution. A useful first inquiry is to determine whether the collective bargaining agreements pre-date the 1974 13(c) agreement or post-date it; similarly, whether they pre-date c.405 or post-date it. All agree that they pre-date c.581 of the Acts of 1980.

The defendants contend that the Transit Union's current collective bargaining agreement is dated August 8, 1979, and the Memorandum of Understanding, dated August 8, 1979, merely incorporated by reference all of the unamended provisions of the Articles of Agreement of January 1, 1973.

They argue further that the notification of desire for change under Section 600 terminates the contract, since there is no other explicit provision for termination.

If the notification of a desire for change provides only for amendment, then it would superficially appear, as defendants say, that the contract rolls on in perpetuity. Massachusetts law, however, provides for termination of such contracts by operaton of law, in some cases on appropriate notice. *Simons* v. *American Dry Ginger Ale Co., Inc.*, 335 Mass. 521, 524, 140 N.E. 2d 649 (1957); *Phoenix Spring Beverage Co.* v. *Harvard Brewing Co.*, 312 Mass. 501, 506, 45 N.E. 2d 473 (1942); *Marble* v. *Standard Oil Co.*, 169 Mass. 553, 561, 48 N.E. 783 (1897). I need not consider what would be necessary to terminate the agreement in this case, because neither party has made any attempt to do so.

The Memorandum of Understanding by its explicit terms provides:

1. That the Articles of Agreement entered into as of January 1, 1973, as amended, shall be further amended as follows:

* * *

Section 600 of the Articles provides that it shall continue in force "until and including the thirty-first day of December, 1975, and from year to year thereafter unless changed by the Parties hereto." Section 601 provides for arbitration in the event of a disagreement with respect to requested changes, "and the Award shall then be entered into and *become a part of this Agreement.* [Emphasis supplied.] I take the Memorandum of Understanding as an authentic interpretation and resolution by the parties of the inconsistent provisions of Sections 600 and 601.

I conclude from the foregoing that the Transit Union's current collective bargaining agreement is embodied in the Articles of Agreement dated January 1, 1973, as most recently amended August 8, 1979.

[3] The defendants contend further that the Machinists' Union has no current collective bargaining agreement at all, and has not had one since December 31, 1977. Their most recent contract is dated January 1, 1976 to continue until December 31, 1977 and from year to year thereafter unless notice of a desire to change or terminate the contract is served by one party on the other at least 60 days before the next anniversary. A notice to change was so served by both parties in October of 1977. By the terms of the contract, this notice operated to cut off the "year to year" extended term. In fact, however, as appears from the uncontradicted affidavit of Anthony Mastandrea, the parties have treated the agreement as continuing in force up to this time, and have mutually enforced its terms as

from time to time amended. I rule that the MBTA is estopped to deny the continuation in force of the agreement dated January 1, 1976, which is the Machinists' Union's current collective bargaining agreement with MBTA.

Accordingly, both collective bargaining agreements predate c.405 of the Acts of 1978.

V. *THE EFFECT OF c.405 OF THE ACTS OF 1978 ON CONTRACT PROVISIONS FOR ARBITRATION—THE CONSTITUTIONAL QUESTION*

[4] The next question concerns the power of the state to alter the existing contractual arrangements of its public corporations. It was early recognized that the contract clause imposes less of a restriction on a state's impairment of the rights of those who deal with public corporations than an impairment of the rights of other contracting parties. It was thought that the state had a compelling interest in the governance of such corporations which outweighed the sanctity of contracts. *Dartmouth College* v. *Woodward,* 17 U.S. (4 Wheat.) 518, 628, 4 L. Ed. 629 (1819). More recently, the state's rights have been perceived as subject to constitutional limitation, even when the contracting party is a public body. This limitation is illustrated by two relatively recent cases: *City of El Paso* v. *Simmons,* 379 U.S. 497, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965), and *United States Trust Company of New York, Trustee* v. *New Jersey,* 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). In summary, a state may impair an obligation of a public body only with respect to some aspect of the contract which was not central to the reasonable expectations of the contracting parties, and then only if the impairment is reasonable and necessary in the furtherance of a valid state policy.

Plaintiffs point to an arbitration "award" now being contested in the Supreme Judicial Court of Massachusetts, in which the arbitrator ruled that c.405 was invalid. The cases cited by the plaintiff to establish collateral estoppel by this award all deal with grievance arbitration. I know of no case in which the judgment of an arbitrator (who may not be a lawyer) is held to bar resolution of a pure question of law by a court of competent jurisdiction.

[5] I rule that c.405 of the Acts of 1978 was effective to amend and add to the agreement of the parties relative to interest arbitration except with respect to the central mutual consideration of the agreement and the core of the parties' reasonable expectations. The detailed application of this principle to the agreement in question follows:

a. I rule that tripartite arbitration, as provided in the agreements, whereby each side chooses its own arbitrator and those arbitrators choose a neutral third, is a central consideration of the contracts and cannot be disturbed by subsequent legislation. So much of c.405 as imposes arbitration by a single arbitrator is invalid.

b. The qualifications of the neutral arbitrator are not stated in the agreements except that he is to be "experienced in transportation". This clearly is not intended to be exclusive. The additional qualifications imposed by c.405 that the neutral arbitrator be a legal resident of the commonwealth and experienced in state and local finance is not in conflict with nor an impairment of the contract, and is a reasonable and valid provision.

c. The agreements do not specify the standards which shall be applied by the arbitrators. Accordingly, there is no conflict or impairment in the provision of c.405 (appearing as M.G.L. c.161A § 19F) requiring the arbitrators to rely "primarily" on eight factors in determining an award. The factors are not exclusive, and, moreover, number 8 includes such factors "normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining [etc.] . . . in the public service of the commonwealth."

d. The limitation on awarding a provision for cost-of-living adjustments after the period covered by the award is a limitation on the prior power of the arbitrators, but I find and rule the same to be within the power of a state to control the affairs of a public corporation.

There are, moreover, two provisions of c.405 which grant to the arbitrators power which they did not have before, to which apparently the plaintiffs do not object. The first is to inquire into the financial capacity of the Authority. The arbitrators are not limited to the specific considerations of tax burdens under this provision, but under the generality of the paragraph can presumably inquire as to other opportunities for savings or for the raising of fares. The second is that the award of the arbitrator may be enforced against the appropriate legislative or appropriating body.[3] M.G.L. c.161A § 19G. *Cf. City of Boston* v. *MBTA*, 373 Mass. 819, 370 N.E. 2d 1359 (1977).

In summary, absent the provisions of section 13(c) of UMTA and the 13(c) agreement of 1974, binding interest arbitration must be conducted in accordance with c.405 of the Acts of 1978 *except* that three arbitrators shall be chosen as provided in the collective bargaining agreements and the third or neutral arbitrator shall be (1) experienced in transportation, (2) a legal resident of the Commonwealth of Massachusetts, and (3) experienced in state and local finances.

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[3] Presumably the Advisory Board and its constituent cities and towns.

VI. *THE EFFECT OF c.581 OF THE ACTS OF 1980 ON THE CONTRACT PROVISIONS—THE CONSITUTIONAL QUESTION*

The same legal criteria apply to this question as are set out at length in the foregoing section. There is no doubt in my mind that the obligation to continue to bargain collectively is a central consideration of the agreements in force when c.581 of the Acts of 1980 was passed. To the extent that c.581 withdraws questions of substance from collective bargaining it is in violation of Article 1, section 10 of the Constitution of the United States. Counsel for the Advisory Board suggests that I consider the practical consequences of my rulings, and I agree that I should where there are areas of discretion or open interpretation. Clear legal and constitutional mandates may not be avoided, however, even if they result in the practical disaster which he foresees. The MBTA's arguable lack of success in collective bargaining does not justify repudiation of its contractual agreements, which were fully authorized by the legislature. M.G.L. c.161A § 19.

VII. *THE EFFECT ON THE FOREGOING OF SECTION 13(c) OF UMTA AND THE 13(c) AGREEMENT ENTERED THEREUNDER*

As previously stated, under the Court of Appeals' decision in *Local Div. No. 714, etc.* v. *Greater Portland, etc.*, 589 F. 2d 1 (1st Cir. 1978), enforcement of rights under section 13(c) means enforcement of the terms of the contract entered into in pursuance thereof. The parties agree that the provision of that contract which bears on this controversy is paragraph 4, the material part of which is as follows:

> 4. The collective bargaining rights of employees of the Authority represented by Labor Organizations signatory hereto[4] including the right to arbitrate labor disputes and to maintain union security and check-off arrangements, to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued.

While such a provision might have broad application in a variety of situations, particularly where a public authority has used UMTA funds to acquire a private transit system, I shall confine my discussion to its effect in the present case. The first inquiry is to settle the meaning of "and/or" in the phrase "provided for by applicable laws and/or existing collective bargaining agreements", since in this case there are both applicable laws and an existing collective bargaining agreement, at least with respect to the Transit Union. While the words and symbol "and/or" are anathema to the purist, "they are continued in use and Courts will have to deal with them according to the facts appearing in any particular case." *McPherrin* v. *Hartford Fire Ins. Co.,* 44 F. Supp. 674, 676 (N.D. Cal., 1942). The practical construction of the phrase is to treat the phrase as if the alternatives were listed with either conjunction and followed by the phrase "or any combination thereof". 17 Am. Jur. 2d, *Contracts,* § 283.

The contract speaks of "existing collective bargaining agreements" and "applicable law." The existing collective bargaining agreement for the Transit Union at the time of this contract were the Articles of Agreement of January 1, 1973. The record is silent as to the then-existing agreement of the Machinists' Union. The word "existing" is conspicuously not modifying applicable law. The continuation of the various employee benefits listed in the agreement is to continue, in my opinion, as provided in the collective bargaining agreement in force in 1974 subject to such laws as are "applicable" from time to time. Chapter 405 is applicable in part, as outlined above, but not applicable with respect to the termination of tripartite arbitration. Chapter 581 is not applicable, because it conflicts with the essential provisions of a prior agreement, and its applicability is interdicted by Article 1, Section 10, of the United States Constitution.

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[4] The plaintiff and the intervenor unions were such signatories.

In short, the rights of the parties established by the interrelation of existing collective bargaining agreements, state statutes and the contract clause of the Constitution have been preserved but not altered by the 13(c) agreement. These rights remain as stated in Sections IV, V and VI of this memorandum. All that section 13(c) has accomplished in the context of this case is to provide a federal forum for the enforcement of these rights.

VIII. *ENJOINING THE LAYOFF — THE MACHINISTS' UNION*

[6] The collective bargaining agreement of the Machinists' Union dated January 1, 1976 remains in force. It contains a flat prohibition against layoffs in Article XIV:

> A. No Layoff—No employee, in any classification under the jurisdiction of the Association, shall be laid off during the term of this Agreement.

Despite the flat, unequivocal language of Article XIV, there remains a necessary residual, inherent right of the MBTA to layoff employees when it runs out of money. Its collective bargaining contract does empower it to demand funds in excess of its budget (unless it is necessary to fund an award made under c.405 of the Acts of 1978, M.G.L. c.161A § 19G). The propriety of such layoffs is clearly a controversy subject to binding arbitration under the terms of Article XLI of the collective bargaining agreement. This is not "interest arbitration" and consequently is not subject to the c.405 of the Acts of 1978 in any respect.

IX. *ENJOINING THE LAYOFF — THE TRANSIT UNION*

[7] The "no layoff" provision, Section 124 of the Transit Union's agreement, as amended August 8, 1979, contains the following provisions:

> Notwithstanding the provisions of Section 106 hereof, no employee in any classification under the jurisdiction of the Union will be laid off up to and including December 31, 1980 . . . [provisions about temporary employees].
>
> For non-miscellaneous employees hired after the date of this Agreement, the No Layoff provision shall not apply during the first thirty (30) months of service.

The members of the Transit Union are in a more perilous situation than the members of the Machinists' Union. Section 124, as amended, provides no job security whatsoever for "non-miscellaneous" (*i. e.*, classified) employees hired after August 8, 1979 during their first 30 months of service. Thirty months have not yet elapsed. These employees constitute a large proportion of those scheduled for layoff on March 21, 1981. They had no contract right to job security, and in view of their contract, no reasonable expectation of job security until 30 months elapsed. Even given the broadest theory of the discretionary power of the court to preserve the status quo, I do not see how a court would have any basis for enjoining the layoff of these employees.[5]

As to the employees hired prior to August 8, 1978, their job security expired on December 31, 1980. Plaintiffs suggest that some generalized obligation of fairness under section 13(c) of UMTA prevents the MBTA from utilizing the breakdown of collective bargaining and the resulting extended hiatus in employment security to accomplish the proposed layoffs. The contract provision was negotiated between the parties, and I perceive no legal or equitable basis for relieving the Union of a tough bargain any more than I see a basis for relieving the MBTA of a number of tough contract provisions upon which the Unions insist.

There is precedent in labor law, however, for maintaining the status quo during arbitration, including interest arbitration. *Local Division 519, Amalgamated Transit Union* v. *Lacrosse*, 445 F. Supp. 798 (W.D. Wisc. 1977), *aff'd*, 585 F. 2d 1340, 1350-51 (7th Cir. 1978); *Teamsters Local Union 71* v. *Akers Motor Lines, Inc.*, 582 F. 2d 1336, 1342 (4th Cir. 1978), *cert. denied*, 440 U.S. 929, 99 S. Ct. 1266, 59 L. Ed. 2d 485 (1979); *Division 1447, Amalgamated Transit Union* v. *Louisville and Jefferson County Transit Authority*, No. C 79-0629 L(A) (W.D.Ky. 1980); *Division 1309, Amalgamated Transit Union* v. *San Diego Transit Corp.*, Civ. No. 78-1093-E (S.D. Cal. 1979). If there were arbitration underway, and there were some likelihood that a resolution of the controversy would occur with reasonable dispatch, the public interest might well be best served by a preliminary injunction. The layoffs and the resulting curtailment of services have been ordered unilaterally by the MBTA with minimal opportunity for consideration of other ways of reducing MBTA expenses to comply with the Advisory Board's budget.

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[5] A possible exception would be a deliberate discriminatory animus in the selection of these employees aimed at causing the brunt of layoffs to fall on recently hired racial minorities. There is nothing in the record so far which would support any such conclusion.

If I were advised before March 21, 1981 that arbitration between the MBTA and the Transit Union has commenced in accordance with this memorandum, I would consider enjoining the layoff of employees hired prior to August 8, 1979, but not otherwise. Accordingly, no injunction will issue at this time.

X. *SUMMARY*

In accordance with the foregoing, I am of the opinion that the plaintiffs are likely to succeed on the merits in establishing the following:

a. The MBTA and the Transit Union are obliged forthwith to institute interest arbitration by three arbitrators chosen in accordance with the Articles of Agreement dated January 1, 1973, but otherwise subject to the qualifications and considerations contained in c.405 of the Acts of 1978.

b. Chapter 581 of the Acts of 1980 is invalid to restrict the scope of collective bargaining contained in the unions' existing collective bargaining agreement, because said chapter constituted an impairment of contract in violation of Article 1, Section 10, of the Constitution of the United States.

c. The proposed layoffs of members of the Machinists' Union is in direct violation of the explicit terms of the collective bargaining agreement, and while they may be justified they are properly the subject of arbitration under the existing agreement before they are effectuated. Such arbitration would not be interest arbitration subject to c.405 of the Acts of 1978.

The plaintiffs are not in my opinion likely to succeed on the merits in establishing any basis for enjoining the proposed layoff of Transit Union employees, except that they might likely succeed with respect to employees hired prior to August 8, 1979 in establishing a basis for an injunction for a reasonable time pending arbitration, as described in paragraph 1 above, providing that such arbitration is set in motion prior to March 21, 1981.

In addition to the likelihood of success on the merits, I am obliged to consider the likelihood of irreparable harm to the plaintiffs if injunctive relief is not granted. Such irreparable harm must be weighed against the harm to the defendants resulting from the issuance of a preliminary injunction. In a case involving a public facility, the public interest must be considered.[6] *Levesque* v. *Maine*, 587 F. 2d 78, 80 (1st Cir. 1978).

Weighing these factors, I am satisfied that a continued hiatus in the collective bargaining and arbitration process puts the continuing operation in such jeopardy as to create a serious likelihood of irreparable harm to the plaintiffs and, more critically, to the public. The discharge of members of the Machinists' Union in violation of their contract, without the opportunity for arbitration, presents a likelihood of irreparable harm to the employees and to the public because of the resulting deterioration of service.

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[6] It should be emphasized that the judgments arrived at in this case do not in any way reflect the court's judgment as to the best way to resolve the problems of the MBTA and its employees. As I indicated at the hearing, in my view, the insistence by the parties on their legal rights may ultimately lead to the demise or receivership of the system. My task, however, is to identify what these rights are and enforce them as requested in accordance with settled principles of law.

Accordingly, preliminary injunctions will issue:

(1) Ordering the MBTA and the Transit Union to proceed forthwith to interest arbitration in accordance with the foregoing memorandum;

(2) Ordering the MBTA and the Machinists' Union to proceed forthwith to arbitration concerning the proposed layoff of 53 members and enjoining such layoff for a reasonable time pending the prompt completion of arbitration.

Pertinent statutes and contracts not quoted are set out in the appendix hereto.

APPENDIX

161A § 19 CORPORATIONS

§ 19. Employees; collective bargaining; arbitration; applicable provisions

The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right:

(*i*) to direct, appoint, employ, assign and promote officers, agents and employees and to determine the standards therefor.

(*ii*) (A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).

(B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse of authority; a reprisal against any employee for the refusal of any person to engage in political activity.

(C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken such clause (A).

(*iii*) to plan and determine the levels of service provided by the authority.

(*iv*) to direct, supervise, control, and evaluate the departments, units, and programs of the authority; to classify the various positions of the authority and ascribe duties and standards of productivity therefor.

(*v*) to develop and determine levels of staffing and training.

(*vi*) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(*vii*) to assign and apportion overtime.

(*viii*) to hire part-time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.

The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law. Except as provided in sections nineteen C to nineteen G, inclusive, the employees of the authority shall submit all grievances and disputes pursuant to arbitration provisions in agreement existing at the time of the creation of the authority or subsequently entered into with the authority or, in the absence of such provisions, to the state board of conciliation and arbitration, or other board or body having similar powers and duties. The provisions of general or special laws relative to rates of wages, hours of employment and working conditions of public employees, shall not apply to the authority nor to the employees thereof, but the authority and its employees shall be governed with respect to hours of employment, rates of wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of its employees by the laws relating to street railway companies.

Amended by St. 1977, c. 970, § 2; St. 1978, c. 405; § 1; St. 1980, c. 581, § 10.

161A § 19A BAY TRANSPORTATION AUTHORITY

§ 19A. State labor relations law; applicability

Notwithstanding any provisions of law to the contrary, the provisions of section five of chapter one hundred and fifty A shall so far as apt apply to the authority and its employees, excepting directors, executives and those confidential employees representing the authority and dealing with employee organizations. Nothing in this section shall be construed as conferring upon the employees of the authority the right to strike, nor as detracting from the obligations of the authority and the employees to submit all grievances and other disputes to arbitration.

Added by St. 1970, c. 514.

Historical Note

St. 1970, c. 514, an emergency act, was approved July 8, 1970.

§ 19B. Deceased employees; payment of wages or vacation allowances to nominated beneficiary, surviving spouse or next of kin

Whenever any employee or former employee of the authority dies, and the authority owes his estate any sum or sums by reason of services rendered by him for wages or vacation allowances, and neither a duly appointed executor or administrator nor a voluntary administrator has made written demand for payment upon the treasurer of the authority and such treasurer shall not otherwise have actual notice that proceedings relative to the formal or informal settlement of such estate have been commenced in any probate court, such sum or sums may, in the discretion of the authority, be paid after the expiration of thirty days from the death of such employee to such person as may have been nominated as beneficiary, on a form approved by the directors and filed with the treasurer by such employee during his lifetime or, if there is no such beneficiary, then to the surviving spouse or next of kin of such employee. Payments made as provided in this section shall discharge all liability of the authority to all persons with respect to such sum or sums.

Added by St. 1973, c. 857.

Historical Note

St. 1973, c. 857, was approved Oct. 2, 1973. Emergency declaration by the Governor was filed Oct. 3, 1973.

Library References

States —64.1(3). C.J.S. States § 94.

§ 19C. Collective bargaining; submission to arbitration

Notwithstanding the provisions of sections nineteen and nineteen A, the authority or any organizations representing employees of the authority shall not be permitted to submit any dispute over the terms of a collective bargaining agreement to arbitration except in accordance with sections nineteen C through nineteen G, inclusive; provided, however, that this section shall not limit the rights of organizations representing employees of the authority to submit grievances to arbitration in acordance with the collective bargaining agreement between the parties.

Added by St. 1978, c. 405, § 2.

1978 Enactment. St. 1978, c. 405, § 2, was approved July 13, 1978, and by section 5 made effective upon its passage.

Sections 3 and 4 as amended by St. 1979, c. 298, § 1, approved June 19, 1979 and by section 2 made effective July 13, 1978 provided:

> "Section 3. Notwithstanding the provisions of any general or special law to the contrary, there shall be no salary adjustment awarded to any management employees of the authority for a period of eighteen months from the date of such employee's last salary adjustment; provided, however, that the provisions of this section shall not apply to any cost-of-living adjustment for management employees who are covered in a collective bargaining agreement."
>
> "Section 4. The provisions of this act are severable, and if any of its provisions shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions."

Library References

Labor Relations —414.

C.J.S. Labor Relations § 405 et seq.

§ 19D. Mediation; selection of mediator; report; selection of arbitrator

In the event the directors and any organizations representing employees of the authority have not reached an agreement within ninety days from the date of the expiration of the agreement, either party may notify the other that it desires mediation. The parties may agree upon a person to serve as a mediator or, if unable to agree on said mediator, either party or the parties acting jointly may petition the board of conciliation and arbitration to appoint a mediator from a list of qualified persons maintained by the board.

After a reasonable period of mediation, not to exceed forty-five days from the date of appointment, said mediator shall issue a report indicating the results of his services in resolving the impasse. If at the conclusion of mediation, the mediator certifies that the impasse still exists, either party may notify the other that it desires arbitration of the matters in dispute. Within ten days of said notice, the parties shall meet to select a single neutral arbitrator. If, within fifteen days, the parties fail to select such single arbitrator, either party may forthwith petition the board of conciliation and arbitration to request a list of five arbitrators from the American Arbitration Association and said Association shall certify to the board that such arbitrators on the list it provides possess the qualifications as provided in section nineteen E. The parties shall thereupon meet to select such arbitrator by striking one name each until one name remains and that person shall serve as the neutral arbitrator. If after ten days, if one of the parties declines to strike their names, the other party shall strike two names and the board shall forthwith select the arbitrator from the remaining three names.

Added by St. 1978, c. 405, § 2.

1978 Enactment. St. 1978, c. 405, § 2, was approved July 13, 1978.

Library References

Labor Relations —414, 453.

C.J.S. Labor Relations §§ 405 et seq., 464, 465.

§ 19E. Qualifications of arbitrator

The single arbitrator, whether agreed upon by the parties or selected by the board of conciliation and arbitration, shall be a legal resident of the commonwealth and shall be experienced in state and local finance.

Added by St. 1978, c. 405, § 2.

1978 Enactment. St. 1978, c. 405, § 2, was approved July 13, 1978.

Library References

Labor Relations —453.

C.J.S. Labor Relations §§ 464, 465.

§ 19F. Factors in determining the basis for award

The arbitrator shall rely primarily on the following factors in determining the basis for an award:

1. The financial ability of the authority to meet additional costs, which shall include but not be limited to:
    - a. the statutory requirement of advisory board approval of the authority's fiscal budget;
    - b. the financial ability of the individual communities and the commonwealth to meet additional costs;

c. the average per capita tax burden, average annual income and sources of revenue within the commonwealth, and the effect of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.

2. The overall compensation presently received by the employees, having regard not only for wages for time actually worked but also for wages for time not worked, including vacations, holidays and other excused time.
3. All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.
4. The hazards of employment, physical, educational and mental qualifications, job training and skills involved.
5. A comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.
6. The average consumer price for goods and services, commonly known as the cost of living.
7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth, and which are not precluded from bargaining under section nineteen.

9. The stipulation of the parties.

Added by St. 1978, c. 405, § 2. Amended by St. 1980, c. 581, § 9.

1978 Enactment. St. 1978, c. 405, § 2, was approved July 13, 1978.

1980 Amendment. St. 1980, c. 581, § 9, in par. 8, added "... and which are not precluded from bargaining under section nineteen".

Section 25 of St. 1980, c. 581, provided:

> "The provisions of this act are severable, and if any of its provisions or an applicaton thereof shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions or other applications thereof."

St. 1980, c. 581 was approved Dec. 7, 1980. Emergency declaration by the governor was filed Dec. 8, 1980.

Library References

Labor Relations ⟹457.

C.J.S. Labor Relations § 473.

§ 19G. Written opinion of arbitrator; binding nature; scope of arbitration; cost of mediation and arbitration

Within thirty calendar days of an award, the arbitrator shall issue a written opinion inclusive of an analysis of all statutory factors applicable to the proceedings. Any determination by the arbitrator, if supported by material and substantial evidence on the record, shall be binding upon the parties and upon the appropriate legislative or appropriating body and may be enforced at the insistence of either party or by the arbitrator in the superior court. The scope of arbitration shall be limited to wages, hours, and conditions of employment and shall not include any provisions for any cost of living adjustments which are based on changes in the Consumer Price Index after the expiration of the contract period covered by the award. In addition, any wage or salary adjustments shall be expressed in per cent or dollar amounts, and in no case shall there be any provision for salary adjustments to occur after the expiration of the contract period covered by the award.

The cost, if any, of the mediation and of arbitration proceedings exclusive of the expenses of the individual parties provided for under sections nineteen C through nineteen G shall be divided equally by the parties and shall be in accordance with a schedule of payments established by the American Arbitration Association.
Added by St. 1978, c. 405, § 2.

ACTS, 1980. – Chap. 581.

THE COMMONWEALTH OF MASSACHUSETTS

Advance Copy 1980 Acts and Resolves

MICHAEL JOSEPH CONNOLLY, State Secretary

Chap. 581. AN ACT RELATIVE TO THE STRUCTURE OF THE MASSACHUSETTS BAY TRANSPORTATION AUTHORITY.

Be it enacted, etc., as follows:

SECTION 1. Section ninety-one A of chapter one hundred and sixty-one of the General Laws is hereby repealed.

SECTION 2. Section 3 of chapter 161A of the General Laws is hereby amended by striking out paragraph (*d*), as most recently amended by section 6 of chapter 1140 of the acts of 1973, and inserting in place thereof the following paragraph:–

(*d*) To appoint and employ officers, including a general manager, agents, and employees to serve at the pleasure of the directors, except as may otherwise be provided in collective bargaining agreements, and to fix their compensation and conditions of employment; provided, however, the authority may bind itself by contract to employ not more than five senior officers but no such contract shall be for a period of more than five years. The advisory board shall approve the appointment of a general manager.

The authority shall annually, on or before January first, submit a schedule of salaries of all its employees and any proposed increases therein to the secretary of administration for his review. Said secretary may make recommendations to the authority on said salary structure and shall advise the authority of the prevailing rates that the commonwealth pays for similar services.

SECTION 3. Said chapter 161A is hereby further amended by striking out section 6, as most recently amended by section 10 of said chapter 1140, and inserting in place thereof the following section:–

Section 6. The authority shall be managed by a board of seven directors, hereinafter in this chapter called the directors, one of whom shall be the secretary, who shall be the chairman and shall not be compensated therefor, six of whom shall be appointed by the governor and who shall serve coterminus with the governor, one with the approval of the advisory board, one with the approval of the fourteen cities and towns, and one with the approval of the sixty-four cities and towns. The approval of the fourteen cities and towns shall be determined by a majority vote of their mayors, or city managers in the cases of Plan D or Plan E cities, and chairmen of the boards of selectmen and town managers in towns having a town council form of government with the vote of each city and town counted as on said advisory board; provided that fifty per cent or more of the total votes as set forth in said section seven is represented at such meeting. The approval of the advisory board and of the sixty-four cities and towns shall be determined by a majority vote of their mayors or city managers and chairmen of selectmen or town managers present and voting thereon with the vote of each city and town counted as on said advisory board; provided that fifty per cent or more of the total votes as set forth in said section seven is represented at such meeting. One of the appointees of the governor shall be experienced in transportation, one a member of organized labor who shall be a member of a national or international labor organization, and one experienced in administration and finance. No more than four of the seven directors shall be members of the same political party. Two of the appointees of the governor shall not be residents of the area constituting the authority.

Any director except the chairman may be removed for cause by the governor and any vacancy in the office of a director shall be filled, by appointment of the governor with the approval applicable to such under the provisions of section three of chapter twelve shall not apply to said board of directors. The six directors appointed by the governor shall receive a salary of seven thousand five hundred dollars. A majority of the directors shall constitute a quorum, but a majority vote of the entire membership of the board of directors shall be required to take any particular action.

SECTION 4. Said chapter 161A is hereby further amended by inserting after section 7 the following section:–

Section 7A. A designee of the governor shall be a member of the advisory board, and shall have the same number of votes on said board as the city or town with the greatest number of votes on said board; provided, however, that the designee shall not be considered a voting member on the approval of any appointment to the board of directors, or the position of general manager; provided, further, that in any case where the designee of the governor, and said city or town with the greatest number of votes shall vote the same, their combined vote shall equal the vote of said city or town; and provided, further, that an affirmative vote of at least one-third of the cities and towns present and voting shall be required for approval of any action or appointment.

The number of votes of such designee shall be in addition to the total number of votes of each city and town as determined by the authority, based upon the most recent annual assessment.

SECTION 5. Said chapter 161A is hereby further amended by inserting after section 1 the following section:–

Section 11A. Any of the sixty-four cities and towns may for the purpose of providing local bus service enter into agreements with any person lawfully authorized to operate any motor bus on any public way therein for the carrying of passengers for hire.

Said city or town shall have the same powers and duties in respect to such private bus carriers as are provided by law for the department of public utilities, except as to safety of equipment and operations, schedules, and routes not being, however, considered safety of equipment and operations for purposes of this paragraph; and provided that the authority shall be notified of the establishment of any such contract local service, but shall not have control or jurisdiction over said service.

SECTION 6. The third paragraph of section 12 of said chapter 1964, is hereby amended by adding the following sentence:—The authority shall consult with the finance advisory board established by section ninety-seven of chapter six prior to the sale of any such notes as to the timing and terms thereof.

SECTION 7. Subsection (*a*) of section 12A of said chapter 161A, as appearing in section 15 of chapter 4 of the acts of 1976, is hereby amended by adding the following sentence:—The authority shall consult with the finance advisory board established by section ninety-seven of chapter six prior to the sale of any such notes as to the timing and terms thereof.

SECTION 8. Section 19 of said chapter 161A is hereby amended by striking out the first sentence, as appearing in section 18 of chapter 563 of the acts of 1964, and inserting in place thereof the following sentences:—The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right:

(*i*) to direct, appoint, employ, assign and promote officers, agents and employees and to determine the standards therefor.

(*ii*)(A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).

(B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse of authority; a reprisal against any employee for the refusal of any person to engage in political activity.

(C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken under such clause (A).

(*iii*) to plan and determine the levels of service provided by the authority.

(*iv*) to direct, supervise, control, and evaluate the departments, units, and programs of the authority; to classify the various positions of the authority and ascribe duties and standards of productivity therefor.

(*v*) to develop and determine levels of staffing and training.

(*vi*) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(*vii*) to assign and apportion overtime.

(*viii*) to hire part-time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.

The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law.

SECTION 9. Section 19F of said chapter 161A, as appearing in section 2 of chapter 405 of the acts of 1978, is hereby amended by striking out paragraph 8 and inserting in place thereof the following paragraph:—

8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth, and which are not precluded from bargaining under section nineteen.

SECTION 10. The second paragraph of section 23 of said chapter 161A, as appearing in section 18 of chapter 563 of the acts of 1964, is hereby amended by adding the following sentence:—No bonds of the authority shall be sold by the authority unless prior to such sale the authority shall have consulted with the finance advisory board established by section ninety-seven of chapter six as to the timing and terms thereof.

SECTION 11. The fourth paragraph of said section 23 of said chapter 161A, as amended by section 3 of chapter 650 of the acts of 1965, is hereby further amended by striking out the last sentence and inserting in place thereof the following sentence:—Subject to the requirement of consultation with the finance advisory board established by section ninety-seven of chapter six, the authority may sell such bonds in such manner, either at public or private sale, and for such price as it may determine to be for the best interests of the authority.

SECTION 12. Said chapter 161A is hereby further amended by striking out section 29, as appearing in section 18 of chapter 563 of the acts of 1964, and inserting in place thereof the following section:—

Section 29. The authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available to the commonwealth or any of its political subdivisions, for any of the purposes of this chapter. If any federal law, administrative regulations or practice requires any action relating to such federal assistance to be taken by any department or instrumentality of the commonwealth other than the authority, such other department or instrumentality is authorized and directed to take all such action, including without limitation filing applications for assistance, supervising the expenditure of federal grants or loans to the foregoing, and the authority is hereby authorized and directed to take all actions which are not inconsistent with state law and which are necessary to permit such other department or instrumentality to comply with federal requirements. If the provisions of any federal law, administrative regulation, or practice governing federal assistance for the purposes of this chapter are inconsistent with any provisions of this chapter to the extent that the commonwealth or its political subdivisions are prohibited or pohibited from receiving such assistance, the chairman of the authority shall, within thirty days after the federal government has notified him that an inconsistency may exist, notify the governor, and the clerks of the house and senate of such inconsistency.

SECTION 13. Chapter 151 of the acts of 1979 is hereby amended by striking out section 8A and inserting in place thereof the following two sections:—

Section 8A. The budget of the Massachusetts Bay Transportation Authority shall not be greater than one hundred and four per cent of the budget approved for said authority for the preceding fiscal year, provided, however, that said budget may be increased by those amounts approved in accordance with section eight B.

Section 8B. The Massachusetts Bay Transportation Authority may increase the budget limit imposed by section eight A by the approval of a specified amount by a two-thirds vote of the members of the advisory board present and voting.

SECTION 14. Section 16 of said chapter 151 is amended by adding the following at the end thereof:–

; provided, however, that sections eight A and eight B shall not expire until December thirty-first, nineteen hundred and eighty-three, and the provisions of section two, and sections 15A through 15E inclusive, insofar as applicable to the provisions of section eight A, shall not expire until December thirty-first, nineteen hundred and eighty-three.

SECTION 15. The directors of the authority, and each of the bargaining units within the authority, are hereby directed to establish for each said bargaining unit a productivity and conduct committee to be composed of three members of management chosen by the directors and three members of the respective bargaining unit, to be chosen by the officers thereof.

Said committees shall recommend the establishment of standards of productivity, and conduct of employees for each respective bargaining unit no later than June thirtieth, nineteen hundred and eighty-one.

The directors shall review, revise and implement said standards no later than thirty days after receiving such recommendations, and shall file a report with the clerk of the house of representatives on each set of standards as they are implemented.

SECTION 16. The authority is hereby authorized and directed to develop, implement and utilize an equipment maintenance information recording system for the authority. The authority shall establish a joint labor-management committee for the purpose of providing consultation and cooperation in the development of said equipment maintenance information recording system. Said systems reporting requirements shall include, but not be limited to, vehicle numbers, defects reported, defects found, cause determination, action taken, by whom, and duration of repair. Said system is to be developed, approved by the authority's board of directors, implemented in the automotive equipment maintenance department, and a report outlining said system filed in the office of the house clerk no later than the first Wednesday of January, nineteen hundred and eighty-two.

The clerk shall forward said report to the joint committees on transportation and post audit and oversight, and the report shall be reviewed by the subcommittee of the post audit and oversight committee, which shall be appointed by the chairman thereof.

Said subcommittee, in consultation with the transportation committee may make such recommendations as they deem necessary to the authority with regard to said information system.

Said systems will be initially implemented in the automotive department and upon acceptance by the authority initiated in all other equipment maintenance departments as it applies to said departments.

SECTION 17. Commencing with the commonwealth's fiscal year nineteen hundred and eighty-four, beginning on July first, nineteen hundred and eighty-three, the Massachusetts Bay Transportation Authority shall operate on a fiscal year cycle coinciding with that of the commonwealth.

The board of directors of said authority shall prepare a plan to implement said fiscal year change and shall submit for approval said plan to the secretary of administration and finance not later than the first Wednesday of December, nineteen hundred and eighty-one.

Notwithstanding any general or special law to the contrary, commencing with the commonwealth's fiscal year nineteen hundred and eighty-four, all expenses of the authority shall be in accordance with an itemized budget. The authority, in consultation with the secretary of transportation and the advisory board, shall prepare and shall submit such budget for the ensuing fiscal year to the secretary and the advisory board not later than the date set by the commission of administration pursuant to section three of chapter twenty-nine of the General Laws for the submission of statements to the budget director.

The secretary shall review and make recommendations regarding such budget within thirty days after submission.

Within forty-five days after submission, the advisory board shall approve said budget as submitted or subject it to such itemized reductions therein as the advisory board shall deem appropriate. Such itemized reductions shall be accompanied by a clear delineation of the areas of services to be reduced and the degree of reduction of service including a statement by location, line, and mode of the level of maintainable service resulting from such itemized reduction. The advisory board shall vote on each item within the authority's budget and may subject the authority's proposed budget to itemized reductions as the advisory board may deem appropriate. The board of directors shall, no later than the first Wednesday in December file a copy of such budget with the governor. Said budget shall include all requests and recommendations of the authority for capital outlay programs and projects for the ensuing year.

Within three weeks after the convening of the general court the governor shall file a copy of the budget with the clerk of the house of representatives and the clerk of the senate. Said budget shall include all requests and recommendations of the authority for capital outlay programs and projects for the ensuing year.

The governor shall include as a line item within the budget submitted pursuant to Section 2 of Article LXIII of the Amendments to the Constitution his recommendation for the share of the net cost of service at the Massachusetts Bay Transportation Authority to be paid by the commonwealth.

SECTION 18. Notwithstanding the provisions of subsection (*i*) of section five of chapter one hundred and sixty-one A of the General Laws, chapter one hundred and fifty-one of the acts of nineteen hundred and seventy-nine, section twenty-seven C of chapter twenty-nine of the Generai Laws and of section twenty A of chapter fifty-nine of the General Laws, the board of directors of the Massachusetts Bay Transportation Authority may by an affirmative vote of the directors, approve and restore to the budget for the calendar year nineteen hundred and eighty any or all itemized reductions which the advisory board may make or may have made in any budget or supplementary budget submitted to it; provided, however, that the amounts so approved and so restored to any such budgets shall not cause it to exceed the total sum of three hundred and forty-three million one hundred and sixty-six thousand eight hundred and forty-six dollars; and provided, further, that no amount in excess of three hundred and forty-three million dollars shall be spent unless the authority conducts its labor negotiations in accordance with chapter four hundred and five of the acts of nineteen hundred and seventy-eight. Said budget shall cover all expenditures incurred by the Maachachusetts Bay Transportation Authority board of directors during calendar year nineteen hundred and eighty, including without limitation those costs incurred pursuant to Executive Order No. 189, issued on November eighteenth, nineteen hundred and eighty. The Local Aid Fund shall be be reduced by the amount of any funds restored pursuant to this section.

SECTION 19. In addition to the contract assistance authorized to be provided in section twenty-eight of chapter one hundred and sixty-one A of the General Laws, the commonwealth, acting by and through the executive office of administration and finance, may enter into an additional contract with the Massachusetts Bay Transportation Authority for contract assistance of a portion of the net cost of the calendar 1980 budget approved by the Advisory Board. In addition, for said year, the commonwealth shall provide assistance equal to the seventy-five per cent of the net cost of service in excess of three hundred and two million, one hundred and thirty thousand, three hundred and seventy-seven dollars authorized by the advisory board for operation of the authority for such year.

SECTION 20. One-third of said additional net cost of service assumed by the commonwealth pursuant to section fourteen C shall be included in any determination of total costs, charges, or fees, under the provisions of section twenty A of chapter fifty-nine of the General Laws, for the cities and towns within the jurisdiction of the authority.

SECTION 21. Section twenty A of chapter fifty-nine of the General Laws, as inserted by section twelve of chapter five hundred and eighty of the acts of nineteen hundred and eighty, shall apply to costs assessed upon member cities and towns of the Massachusetts Bay Transportation Authority, for the operation thereof, beginning calendar year nineteen hundred and eighty-one.

SECTION 22. The board of directors serving on the effective date of this act shall continue to serve until their successors are duly appointed.

SECTION 23. All position vacant or which become vacant, on or after the effective date of this act, shall remain vacant; provided, that vacancies for which there exists a critical need may be filled upon certification of said critical need by the secretary of administration and finance; and provided, further, that the secretary shall report quarterly to the house and senate committees on ways and means the number, salary, title and job descriptions of all persons hired under the provisions of this section. No employee shall be terminated as part of any reduction in force, which result from enactment of this act, except in accordance with the provisions of the collective bargaining agreement in effect on the date of such termination.

SECTION 24. Section four of this act shall become inoperative on July first, nineteen hundred and eighty-three.

SECTION 25. The provisions of this act are severable, and if any of its provisions or an application thereof shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions or other applications thereof.

Approved December 7, 1980.

EMERGENCY LETTER

December 8, 1980 @ 12:46 PM

§ 1609. Labor standards

Action of Secretary

(a) The Secretary shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed with the assistance of loans or grants under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. The Secretary shall not approve any such loan or grant without first obtaining adequate assurance that required labor standards will be maintained upon the construction work.

Authority of Secretary cf Labor

(b) The Secretary of Labor shall have, with respect to the labor standards specified in subsection (a) of this section, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267), and section 276c of Title 40.

Interests of employees; protective arrangements; terms and conditions

(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Pub. L. 88–365, § 13, formerly § 10, July 9, 1964, 78 Stat. 307, renumbered and amended Pub. L. 89–562, § 2(a)(1), (b)(2), Sept. 8, 1966, 80 Stat. 715, 716; Pub. L. 90–19, § 20 (a), May 25, 1967, 81 Stat. 25.

AGREEMENT PURSUANT TO SECTION 13(c) OF THE URBAN MASS TRANSPORTATION ACT OF 1964, AS AMENDED.

This agreement is made and entered into by and between the Massachusetts Bay Transportation Authority ("Authority"), party of the first part, and the labor organizations signatory hereto ("Unions"), party of the second part.

WHEREAS, the Authority has filed applications under the Urban Mass Transportation Act of 1964, as amended ("Act"), for a capital grant to finance (1) Plant and Facilities Improvements; (2) Acquisition and Installation of Plant Machinery and Equipment; (3) Acquisition of Non-Revenue Equipment and Rolling Stock; (4) Power and Signal System Improvements; (5) Acquisition and Installation of Bus Radios, entitled "Plant Improvements—Phase III", as more fully described in the project application dated December 21, 1973; (6) Bus Storage and Maintenance Facilities at Charlestown, as more fully described in the project application dated April 19, 1974; (7) Purchase of 203 New Buses; (8) Purchase of 276 New Buses, as more fully described in project applications dated April 17, 1974; and (9) Restoration of Track Support Structures, as more fully described in project application dated

August 7, 1974; and Immediate Needs—Power Generation Improvements, as more fully described in project application dated October 28, 1974—("Project"); and

WHEREAS, section 13(c) of the Act requires, as a condition of any assistance thereunder, that fair and equitable arrangements be made, as determined by the Secretary of Labor, "to protect the interests of employees affected by such assistance"; and

WHEREAS, the Unions signatory hereto represent certain employees of the Authority and certain other carrier employers in the area presently served by the Authority; and

WHEREAS, the scope and purpose of this agreement is to provide fair and equitable arrangements pursuant to Section 13(c) of the Act to protect the interests of employees affected by such assistance to the Project; and

WHEREAS, the following arrangements have been agreed upon by the parties hereto as fair and equitable;

NOW, THEREFORE, IT IS AGREED that in the event the Project is approved for assistance under the Act the following terms and conditions shall apply:

1. The phrase "as a result of the Project" shall, when used in this Agreement, include events occurring in anticipation of, during, and subsequent to the Project; provided, however, that fluctuations and changes in volume or character of employment brought about solely by other causes are not within the purview of this Agreement. The term "Project", as used in this Agreement shall not be limited to the particular facility assisted by federal funds, but shall include any changes, whether organizational, operational, technological or otherwise, which are traceable to the assistance provided, whether they are the subject

of the grant contract, reasonably related thereto, or facilitated thereby.

2. The Project shall be carred out in such a manner and upon such terms and conditions as will not in any way adversely affect employees covered by this agreement.

3. (a) All rights, privileges (including pension rights and benefits) of employees of the Authority in classifications represented by the Labor Organizations signatory hereto (including employees already retired) under the existing collective bargaining agreements or otherwise shall be preserved and continued unless changed, altered or amended as provided in said collective bargaining agreements.

3. (b) The Authority shall similarly protect such rights, privileges and benefits of other employees covered by this agreement who are in the service area of the Authority against any worsening of such rights, privileges and benefits as a result of the Project.

4. The collective bargaining rights of employees of the Authority represented by Labor Organizations signatory hereto including the right to arbitrate labor disputes and to maintain union security and check-off arrangements, to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued. If, at any time, applicable state law or the collective bargaining agreement permit or grant to the employees of the Authority the right to utilize any economic measures, nothing in this agreement shall be deemed to foreclose the exercise of such right.

5. (a) In the event the Authority contemplates any change in the organization or operation of its system as a result of the Project which may result in the dismissal, dis-

placement or re-arrangement of the employees represented by the labor organizations signatory to this Agreement, the Authority shall do so only in accordance with the provisions of subparagraph (b) hereof.

(b) The Authority shall give to said labor organizations at least ninety (90) days written notice of such change by certified mail. Such notice shall contain a full and adequate statement of the proposed changes, including the approximate number of employees and classifications which may be affected by such change, and the number and classification of any jobs with the Authority which are available and may be filled by such affected employees.

At the request of either the Authority or the representatives of the affected employees, negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this agreement shall commence immediately. These negotiations shall include determining the selection of forces from among the employees of other carrier employers who may be affected as a result of the Project, to establish which such employees shall be offered employment with the Authority for which they are qualified or can be trained; not, however, in contravention of collective bargaining agreements relating thereto. If no agreement is reached within thirty (30) days from the commencement of negotiations, any party to the dispute may submit it in accordance with the procedures contained in paragraph 13(a) hereof.

6. (a) Whenever an employee retained in service, recalled to service, or employed pursuant to paragraphs 5, 7(e), or 14 hereof is placed in a worse position with respect to compensation as a result of the Project, he shall be paid a monthly "displacement allowance" to be determined in accordance with this paragraph. Said displacement allow-

ance shall be paid each displaced employee during the protective period following the date on which he is first "displaced" and shall continue during the protective period so long as the employee is unable, in the exercise of his seniority rights, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, adjusted to reflect subsequent general wage adjustments, including cost of living adjustments.

(b) The displacement allowance shall be a monthly allowance determined by computing the total compensation received by the employee, including vacation allowances, monthly compensation guarantees and any other pay allowances or guarantees, and his total time paid for during the last twelve (12) months in which he performed compensated service more than fifty per centum of each such months, based upon his normal work schedule, immediately preceding the date of his displacement as a result of the Project, and by dividing separately the total compensation and the total time paid for by twelve (12), thereby producing the average monthly compensation and the average monthly time paid for. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost of living adjustments. If the displaced employee's compensation in his current position is less in any month during his protective period than the aforesaid average compensation (adjusted to reflect subsequent general wage adjustments, including cost of living adjustments), he shall be paid the difference, less compensation for any time lost on account of voluntary absences to the extent that he is not available for service equivalent to his average monthly time, but he shall be compensated in addition thereto at the rate of the current position for any time worked in excess of the average monthly time paid for. If the displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence to which he is entitled under the then-existing collective bargaining agreement, and which carries a wage rate and compensation equal to or exceeding those of the position which he elects to retain he shall thereafter be treated, for the purposes of this paragraph, as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employees's resignation, death, retirement, or dismissal for cause.

7. (a) Whenever any employee is laid off or otherwise deprived of employment as a result of the Project, in accordance with any collective bargaining agreement applicable to his employment, he shall be considered a "dismissed employee" shall be paid a monthly dismissal allowance to be determined in accordance with this paragraph. Said dismissal allowance shall first be paid each dismissed employee on the thirtieth (30th) day following the day on which he is "dismissed" and shall continue during the protective period, as follows:

Employee's length of service prior to adverse effect	Period of Protection
1 day to 6 years	equivalent period
6 years or more	6 years

The monthly dismissal allowance shall be equivalent to one-twelfth (1/12th) of the total compensation received by him in the last twelve (12) months of his employment in which he performed compensation service more than 50 per centum of each such month based on his normal work schedule to the date on which he was first deprived of employment as a result of the Project. Such allowance shall be adjusted to reflect subsequent general wage adjustments, including cost of living adjustments.

(b) An employee shall be regarded as deprived of employment and entitled to a dismissal allowance when the position he holds is abolished as a result of the Project or when the position he holds is not abolished but he loses that position as a result of the exercise of seniority rights by an employee whose position is abolished as a result of the Project or as a result of the exercise of seniority rights by other employees brought about as a result of the Project; and he is unable to obtain another position, either by the exercise of his seniority rights, or through the Authority, in accordance with subparagraph (e). In the absence of proper notice followed by such an agreement or award pursuant to paragraph 5 hereof, no employee who has been deprived of employment as a result of the Project shall be required to exercise his seniority rights to secure another position in order to qualify for a dismissal allowance hereunder.

(c) Each employee receiving a dismissal allowance shall keep the Authority informed as to his current address and the current name and address of any other person by whom he may be regularly employed, or if he is self-employed.

(d) The dismissal allowance shall be paid to the regularly assigned incumbent of the position abolished. If the position of an employee is abolished when he is absent from service he will be entitled to the dismissal allowance when he is available for service. The employee temporarily filling said position at the time it was abolished will be given a dismissal allowance on the basis of that position, until the regular employee is available for service, and thereafter shall revert to his previous status and will be given the protections of the agreement in said position, if any are due him.

(e) An employee receiving a dismissal allowance shall be subject to call to return to service by his former employee after being notifed in accordance with the terms of the then existing collective bargaining agreement. Prior to such call to return to work by his employer, he may be required by the Authority to accept reasonably comparable employment which carries a wage rate and compensation equal to or exceeding that of his former position adjusted to reflect subsequent wage increases and cost of living adjustments, and for which he is physically and mentally qualified or for which he can become qualified after a reasonable training or retraining period, provided it does not require a change in residence or infringe upon the employment rights of other employees under then existing collective bargaining agreements.

(f) When an employee who is receiving a dismissal allowance again commences employment in accordance with subparagraph 7(e) above, said allowance shall cease while he is so reemployed and the period of time during which he is so reemployed shall be deducted from the total period for which he is entitled to receive a dismissal allowance. During the time of such reemployment, he shall be entitled to the protections of this Agreement to the extent they are applicable.

(g) The dismissal allowance of any employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings from such other employment or self-employment, any benefits received from any unemployment insurance law, and his dismissal allowance exceed the amount upon which his dismissal allowance is based. Such employee, or his union representative, and the Authority shall agree upon a procedure by which the Authority shall be kept currently informed of the earnings of such employee in employment other than with his former employer, including self-employment, and the benefits received.

(h) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the failure of the employee without good cause to return to service in accordance with the working agreement or to accept employment as provided under subparagraph (e) above, or in the event of his resignation, death, retirement, or dismissal for cause.

8. In determining length of service of a dismissed employee for purposes of this agreement, such employee shall be given full seniority credits in accordance with the records and labor agreements applicable to him in his former employment and he shall be given continuing seniority credits for each month in which he receives a dismissal allowance as if he were continuing to perform services for his former employer, provided, however, that this paragraph shall not be deemed to enlarge upon the employee's protective period as defined in paragraph 18, nor to enlarge upon the benefit levels otherwise provided by this agreement.

9. No employee receiving a dismissal allowance shall be deprived during the protective period of any benefits attached to his previous employment, such as group life insurance, hospitalization, medical care and free transportation, as well as any other benefits to which he may be entitled under the same conditions and so long as the benefits continue to be accorded to other employees of the bargain-

ing unit, in active service or laid off, as the case may be.

10. (a) Any employee covered by this Agreement who is retained in the service of his employer, or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment in order to retain or secure active employment with his employer, or the Authority in accordance with this Agreement, and who is required to move his place of residence, shall be reimbursed for all expenses of moving his household and other personal effects, for the traveling expenses for himself and his immediate family, including living expenses for himself and his immediate family, and for his own actual wage loss during the time necessary for such transfer and for a reasonable time thereafter, not to exceed five (5) working days. The exact extent of the responsibility of the Authority under this paragraph, and the ways and means of transportation, shall be agreed upon in advance between the Authority and the affected employee or the representative. No claim for reimbursement shall be paid under the provisions of this paragraph unless such claim is presented to the Authority within ninety (90) days after the date on which the expenses were incurred.

(b) If any such employee is laid off within three (3) years after changing his point of employment in accordance with paragraph (a) hereof and elects to move his place of residence back to his original point of employment, the Authority shall, to the same extent provided in subparagraph (a) hereof, assume the expense of moving his household and other personal effects.

(c) Except as otherwise provided in subparagraph (b), changes in places of residence, subsequent to the initial changes as a result of the Project, which are not the result of the Project but grow out of the normal exercise of seniority rights, shall not be considered to be within the purview of this paragraph.

11. (a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of his employer (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment as a result of the Project, and is thereby required to move his place of residence:

If the employee owns his own home in the locality from which he is required to move, he shall, at his option, be reimbursed by the Authority for any loss suffered in the sale of his home for less than its fair market value, plus conventional fees and closing costs, such loss to be paid within thirty (30) days of settlement or closing on the sale of the home. In each case, the fair market value of the home in question shall be determined, as of a date sufficiently prior to the date of the Project so as to be unaffected thereby. The Authority shall, in each instance, be afforded an opportunity to purchase the home at such fair market value before it is sold by the employee to any other person and to reimburse the seller for his conventional fees and closing costs.

If the employee is under a contract to purchase his home, the Authority shall protect him against loss under such contract, and, in addition, shall relieve him from any further obligation thereunder.

If the employee holds an unexpired lease of a dwelling occupied by him as his home, the Authority shall protect him from all loss and cost in securing the cancellation of said lease.

(b) No claim for loss shall be paid under the provisions of this paragraph unless such claim is presented to the Authority within ninety (90) days after the date the employee is required to move.

(c) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through a joint conference between the employee, or his union representative, and the Authority. In the event they are unable to agree, the dispute or controversy may be referred by the Authority or the union to a board of competent real estate appraisers selected in the following manner: one (1) to be selected by the representatives of the employee and one (1) by the Authority and these two, if unable to agree within thirty (30) days upon the valuation, shall endeavor by agreement within ten (10) days thereafter to select a third appraiser or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the real estate commission of Massachusetts to designate within ten (10) days a third appraiser, whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the neutral appraiser, including expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

(d) The phrase "change in residence", when used in this agreement shall have the following meanings:

1. When the employees of the Authority represented by the Labor Organizations signatory to this Agreement

are so affected—said phrase shall mean a transfer to a work location which is located outside the radius of 20 miles of the employee's former work location and farther from his residence than was his former work location.

2. When the employees of private mass transportation carriers represented by the Labor Organizations signatory to this Agreement are so affected—said phrase shall mean transfer to a work location which is located more than 30 normal highway route miles from his residence and also farther from his residence than was his former location.

12. If any employer of the employees covered by this Agreement or the Authority shall have rearranged or adjusted its forces in anticipation of the Project, with the effect of depriving an employee of benefits to which he should be entitled under this agreement, the provisions of this agreement shall apply to such employee as of the date when he was so affected.

13. (a) In the event there arises any dispute or controversy (except as defined in paragraph 11 hereof) with respect to the protection afforded by this Agreement, or with respect to the interpretation, application or enforcement of the provisions of this Agreement, which cannot be settled by the parties hereto within thirty (30) days after the dispute or controversy first arises, it may be submitted at the written request of any such party to final and binding arbitration or adjustment in accordance with the following arrangements:

> (1) Any such labor dispute involving solely employees of the Authority covered by this Agreement shall be referred to arbitration in accordance with the arbitration procedures set forth in any then-applicable collective bargaining agreement between the Authority and the Union representing such employees.

The term "labor dispute", as used in this paragraph, shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions, or benefits, including health and welfare, sick leave, insurance or pension or retirement provisions, the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, the interpretation or application of such agreements, the adjustment of grievances, and any claim, difference, or controversy arising out of, or by virtue of, the within arrangements for the protection of employees.

(2) Any such labor dispute involving solely employees covered by this agreement who are subject to the Railway Labor Act, as amended, shall be referred for adjustment in accordance with the terms of said Act, provided that if the Authority shall not have the power to invoke such procedures, it may refer such dispute to arbitration pursuant to the Rules of the American Arbitration Association.

(3) Any other labor dispute involving multiple parties or otherwise outside the scope of the foregoing subparagraphs (1) or (2) shall be submitted, at the written request of any of the parties to this Agreement, to a single arbitrator mutually acceptable to the parties involved in the dispute. Failing mutual agreement within thirty (30) days as to the selection of an arbitrator, the parties involved shall request the Secretary of Labor to appoint an arbitrator. The arbitrator shall convene the hearing within fifteen (15) days after his selection or appointment and shall render his decision within forty-five (45) days after the hearing of the dispute or controversy has been concluded and the record closed.

(b) Authority of the arbitrator or Board of Arbitrators shall be limited to the determination of the dispute or controversy arising out of the interpretation, application or operation of the provisions of this Agreement. The Arbitrator or Board of Arbitration shall not have any authority whatsoever to alter, amend, or modify any of the provisions of any existing collective bargaining agreement.

(c) The salaries and expenses of the neutral member, and any other jointly incurred expenses, shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(d) In the event of any dispute as to whether or not a particular employee was laid off or otherwise deprived of employment, placed in a worse position with respect to his employment, or required to change his place of residence as a result of the Project, it shall be the employee's obligation to specify, if possible, the adverse effect which he has suffered. It shall then be the Authority's burden to establish affirmatively that any such deprivation, worsening of employment, or change of residence as claimed by the employee, was not a result of the Project by proving that factors other than the Project affected the employee. The claiming employee shall prevail if it is established that the Project had an effect upon his employment even if other factors may also have affected the employee.

14. During his protective period a dismissed employee shall, if he so requests, be granted priority of employment or reemployment to fill any vacant position within the jurisdiction and control of the Authority, reasonably comparable to that which he held when dismissed, for which he is, or by training or retraining can become, qualified; not, however, in contravention of collective bargaining agreements relating thereto. In the event such employee requests such training or re-training to fill such vacant position, the Authority shall provide for such training or retraining at no cost to the employee. The employee

shall be paid the salary or hourly rate provided for in the applicable collective bargaining agreement for such position, plus any displacement allowance to which he may be otherwise entitled. If such dismissed employee who has made such a request fails without good cause within ten (10) days to accept an offer of a position comparable to that which he held when dismissed for which he is qualified, or for which he has satisfactorily completed such training he shall, effective at the expiration of such ten (10) day period, forfeit all rights and benefits under this Agreement.

15. A dismissed employee entitled to protection under this agreement may, at his option, resign and (in lieu of all other benefits and protections provided in this Agreement or any other agreement) accept a lump sum payment computed in accordance with Section 9 of the Washington Job Protection Agreement of May, 1936.

16. The Authority will be financially responsible for the application of these conditions and will make the necessary arrangements so that any employee affected as a result of the Project may file a claim through his union representative with the Authority within sixty (60) days of the date he is terminated or laid off as a result of the Project, or within eighteen (18) months of the date his position with respect to his employment is otherwise worsened as a result of the Project, as provided by paragraph 6; provided, in the latter case, if the events giving rise to the claim have occurred over an extended period, the 18-month limitation shall be measured from the last such event. Unless such claims are filed with the Authority within said time limitations, the Authority thereafter will be relieved of all liabilities and obligations related to said claims. The Authority will honor the claim by making ap-

propriate payments or will give notice to the claimant and his representative of the basis for denying or modifying such claim, giving reasons therefor. In the event the Authority fails to honor such claim, the union may invoke the following procedures for further joint investigation of the claim by giving notice in writing of its desire to pursue such procedures. Within ten (10) days from the receipt of such notice, the parties shall exchange such factual material as may be requested of them relevant to the disposition of the claim; shall honor all reasonable requests for information; and shall jointly take such steps as may be necessary or desirable to obtain from any third party such additional factual material as may be relevant. In the event the claim is so rejected by the Authority, the claim may be processed to arbitration as hereinabove provided by paragraph 13. Prior to the arbitration hearing, the parties shall exchange a list of intended witnesses. In conjunction with such proceedings, the impartial arbitrator shall have the power to subpoena witnesses upon the request of any party and to compel the production of documents and other information which is relevant to the disposition of the claim.

17. Nothing in this Agreement shall be construed as depriving any employee of any rights or benefits which such employee may have under any existing job security or other protective conditions or arrangements by collective bargaining agreement or law, including Public Law 93–236, enacted January 2, 1974; provided that there shall be no duplication of benefits to any employees, and, provided further, that any benefit under this agreement shall be construed to include the conditions, responsibilities and obligations accompanying such benefit.

18. Whenever used herein, the term "protective period" means that period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or dismissed, to the expiration of six (6) years therefrom; provided, however, that the protective period for any particular employee during which he is entitled to receive the benefits of these provisions shall not continue for a longer period, following the date he was displaced or dismissed, then the employee's length of service, as shown by the records and labor agreement applicable to his employment prior to the date of his displacement or his dismissal. For Purposes of determining the protective period of a particular employee, the employee's length of service shall be measured in accordance with section 7(b) of the Washington Job Protection Agreement of May, 1936.

19. No provisions, terms or obligations herein contained shall be affected, modified, altered or changed in any respect whatsoever by reason of any agreement made by the Authority with employers of employees covered by this Agreement.

20. In the event any provision of this Agreement is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this Agreement shall not be affected, and the parties shall attempt to arrive at a mutually satisfactory agreement on an adequate replacement under section 13(c) of the Act. Failing to agree, any party may invoke arbitration under the provisions of paragraph 13 of this Agreement, to determine a substitute provision which shall be incorporated in this Agreement, and any other appropriate action, remedy, or relief.

21. Any other labor organization which is the certified or recognized collective bargaining representative of Mass

Transportation employees in the service area of the Project, and who are effected by the Project within the meaning of 49 U.S.C.A. 1609(c), may give written notice of its intention to become a party to this Agreement to the original signatories and to the Secretary of Labor, within sixty (60) days of the date of the original execution of this Agreement.

If the original signatories to this Agreement do not agree that such labor organization should become a party, then the dispute as to whether such labor organization shall become a signatory shall be determined by the Secretary of Labor.

22. (a) It is the intent of this Agreement to provide employee protections which meet the requirements of Section 13(c) of the Act, and are not less than the benefits established pursuant to Section 5(2)(f) of the Interstate Commerce Act and Section 405(b) of the Rail Passenger Service Act of 1970, as amended. In so doing, changes in wording and organization from arrangements earlier developed under Section 5(2)(f) and section 405(b) have been necessary to make such benefits applicable to this Project. In making such changes, it is not the intent of this Agreement to diminish such benefits. Thus, the terms of this Agreement are to be resolved in favor of this intent to provide employee protection and benefits no less than those established pursuant to Section 5(2)(f) of the Interstate Commerce Act and section 405(a).

(b) In the event the Authority should propose a change as a result of the Project which would constitute a "coordinaton" as defined by the Washington Agreement, or an acquisition of an existing transportation system as provided by Section 13(c)(4) of the Urban Mass Transportation Act, as amended, the Authority shall proceed with such coordination or acquisition only in accordance with the provisions of Sections 4 and 5 of the Washington Agreement.

23. In the event the Project is approved for assistance under the Act, the foregoing terms and conditions shall be made a part of the contract of assistance between the Federal government and the applicant for Federal funds; provided, however, that this agreement shall not merge into the contract of assistance but shall be independently binding and enforceable by and upon the parties hereto, in accordance with its terms, nor shall any collective bargaining agreement merge into this Agreement, but each shall be independently binding and enforceable by and upon the parties thereto, in accordance with its terms.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their respective duly authorized representatives this 10th day of December, 1974.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, *Plaintiff,* v. THE COMMONWEALTH OF MASSACHUSETTS, ET AL, *Defendants.*	CIVIL ACTION NO. 79-2058-S

ORDER ON MOTIONS FOR CLARIFICATION AND RECONSIDERATION OF MEMORANDUM OF MARCH 17, 1981

SKINNER, D. J.

Several of the parties seek clarification and reconsideration of my memorandum and order of March 17, 1981. That order was prepared in some haste to meet an exigency created by impending layoffs of MBTA employees. There are undoubtedly some lacunae and inconsistencies in it, but I do not think it worthwhile to attempt to rework the whole order at this time. This matter is scheduled for argument within three weeks before the Court of Appeals, which will have the opportunity to give authoritative direction to the case. There are several clarifications, however, which may be useful as a guide to the ongoing arbitration and to assist the Court of Appeals:

1. Although the language in Part X(b) of the memorandum is arguably broader, I do not consider that either the contract clause of the Constitution or the 13(c) agreement imposes any obligation to expand the areas of col-

lective bargaining. Withdrawal of subjects open to collective bargaining under the provisions of existing contracts is prohibited, in my opinion, as stated in Part VI of the memorandum.

2. At the time I wrote the March 17 memorandum, it was my understanding that the MBTA and the Transit Union were seeking in the summer and fall of 1980 to further amend their 1973 collective bargaining agreement. It was asserted at argument on May 13, 1981, by the Assistant Attorney General for the Commonwealth that the parties have agreed to terminate the 1973 agreement and write a new one.[1] This is not clear to me from the record, nor did I get any sense of the views of the MBTA and the Transit Union at this point.

If what is proposed is a new contract, the new contract may comply with the recent Massachusetts statutes to a greater degree than in the case of an amendment. The contract clause of itself does not prevent legislative regulation of subsequent contracts. The emphasis thus shifts to § 13(c) of the Urban Mass Transportation Act and the agreement entered into by the MBTA and its unions thereunder. The critical section is Section 4. As I stated on March 17, in my opinion, the obligation to preserve arbitration is subject to applicable laws which may be passed from time to time. The arbitration provisions of a new contract must conform to c.405 of the Acts of 1978.

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[1] On March 17, I wrote, "I need not consider what would be necessary to terminate the agreement in this case, because neither party has made any attempt to do so." This sentence did apply to the Transit Union's agreement, not to the Machinists' Union, as I erroneously stated in colloquy with Attorney Gleason.

In my opinion, the "applicable laws" phrase does not modify the obligation to preserve collective bargaining rights. I read the phrase "to the extent such are provided for by applicable laws and/or existing collective bargaining agreements" as referring only to "the right to arbitrate labor disputes and to maintain union security and check-off arrangements." The word "such" was not in my opinion intended to refer to "the collective bargaining rights of employees." Accordingly, even in a new collective bargaining agreement, existing collective bargaining rights must be preserved.

3. The Assistant Attorney General also argues that arbitration is treated separately from collective bargaining in Section 9 of c.581 of the Acts of 1980, amending M.G.L., c.161A, § 19F. This section permits the arbitrator in interest arbitration to consider factors traditionally taken into consideration in the public service of the commonwealth, "and which are not precluded from bargaining under § 19 [as amended by Section 8 of said Chapter 581]." The commonwealth suggests that this section is effective to eliminate the subjects listed in Section 8 from arbitration even though Section 8 is not itself effective to withdraw those subjects from collective bargaining. As stated above, arbitration is not as comprehensively protected by the 13(c) agreement as is collective bargaining, and the commonwealth could have withdrawn those subjects from arbitration by appropriate language. They used the phrase "precluded from bargaining under Section 19," however, which, in my view, ties Section 9 of c.581 to Section 8, notwithstanding the Act's severability clause (Section 25).

While the considerations dealt with in parts 2 and 3 of the memorandum may alter to some extent the legal theories underlying the orders of March 17 and March 20, they do not materially affect the result. As I stated at oral argument, the parties' energies are best devoted to presenting these matters to the Court of Appeals.

4. The commonwealth has filed various affidavits designed to demonstrate the emergent disastrous effect of the Transit Union's work rules. Counsel for the union contests the conclusions reached by the affiants regarding the effect of these rules on the efficiency of the MBTA. Accordingly, I cannot make any useful findings of fact on the latter point without an evidentiary hearing. There appears to be no dispute, however, about the existence of the following work rules for whatever significance they may have:

a. Management may not make temporary reassignments of employees to jobs at locations different from their regular assignment.

b. Employees may not be temporarily reclassified to meet unexpected needs.

c. Rapid transit vehicles within a storage yard must be moved by a yard motorman and may not be moved by the regular operators of the vehicles even if there are not enough yard motormen on duty at a particular time. The yard motormen do not do any other work.

d. Employees may not be assigned to two "details."

e. Overtime is paid on the basis of an eight-hour day rather than a 40-hour week, and in any case must first be offered to senior employees on a system-wide basis. An employee may receive overtime without having worked a full 40-hour week.

f. There is system-wide bidding for jobs on the basis of seniority.

g. Motormen must be assigned to rail maintenance vehicles, but do not operate the vehicle or participate in maintenance.

h. Schedules once assigned may not be changed to meet shifting rider demands, except on a three-month basis.

i. Penalties must be paid to drivers on split runs if the break exceeds two hours. MBTA pays $2.6 million per year in such penalties.

j. There are restrictions on the hiring of part-time drivers.

I make no findings with respect to the effect of the foregoing work rules, or the justification for them, concerning which I have not heard evidence or argument. Furthermore, I express no opinion as to the relevance of any of the above work rules to any issue before me or before the Court of Appeals.

WALTER JAY SKINNER,
United States District Judge.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,

Plaintiff, Appellant,

v. **No. 81-1180**

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defendants, Appellees.

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, ET AL.,

Plaintiffs, Appellees,

v. **No. 81-1198**

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defendants, Appellants.

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO,

Plaintiff, Appellee,

v. **No. 81-1219**

THE COMMONWEALTH OF MASSACHUSETTS,

Defendant, Appellee,

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

Defendant, Appellants.

JUDGMENT—Entered September 30, 1981

This cause came on to be heard on appeals from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: Accordingly, to the extent that it is inconsistent with the opinion filed this day, the district court's order of March 17, 1981, as clarified on May 15, 1981, is vacated and the case is remanded for further proceeding consistent with the opinion filed this day.

No costs.

By the Court:

Clerk.

cc: Ms. Hirshman and Messrs. Golann, Elcock and Riley.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,

Plaintiff, Appellant,

v. **No. 81-1180**

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defendants, Appellees.

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, ET AL.,

Plaintiffs, Appellees,

v. **No. 81-1198**

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defendants, Appellants.

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO,

Plaintiff, Appellee,

v. **No. 81-1219**

THE COMMONWEALTH OF MASSACHUSETTS,

Defendant, Appellee,

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, *U.S. District Judge*]

[511 F. Supp. 312 (D. Mass. 1981)]

OPINION—Filed September 30, 1981

Before: Campbell, Bownes and Breyer, *Circuit Judges.*

Linda R. Hirshman, with whom *Jacobs, Burns, Sugarman & Orlove, Earle Putnam,* General Counsel, *Douglas Taylor,* and *Gromfine, Sternstein, Rosen and Taylor, P.C.* were on brief, for Local Division 589, Amalgamated Transit Union.

Dwight Golann, Assistant Attorney General, with whom *Francis X. Bellotti,* Attorney General, *Mitchell S. Sikora, Jr., Bruce Mohl, Stephen M. Limon,* Assistant Attorneys General, and *Max Beck* were on brief, for The Commonwealth of Massachusetts, et al.

Joseph Elcock, General Counsel, with whom *Ronald G. Busconi,* Assistant General Counsel, was on brief for the Massachusetts Bay Transportation Authority.

William J. Riley, and *Flamm, Kaplan, Paven & Feinberg* on brief for the Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers.

Breyer, *Circuit Judge.* This case raises two difficult and important sets of questions concerning collective bargaining and rapid transit. First, can the Commonwealth of Massachusetts enact statutes that are inconsistent with assurances that its Transit Authoritly previously gave the Secretary of Labor as part of an application for federal grant money? Second, do those Massachusetts statutes unconstitutionally impair pre-existing collective bargaining contracts? We find that insofar as federal law is concerned, the state statutes are valid.

Since 1912 appellant, Local 589 of the Amalgamated Transit Union (the "Transit Union") has represented most Boston transit system employees. Before 1947, it negotiated contracts with the system's private owners (Boston Elevated Railway). Since 1947, it has negotiated with the system's public owner, which is now the Massachusetts Bay Transportation Authority (MBTA).[1] The MBTA is a public agency with power to enter into binding agreements on behalf of the Commonwealth.[2]

On January 1, 1973, the Transit Union and the MBTA entered into a detailed agreement setting forth wages, hours and working conditions. We shall refer to that agreement as the Basic Agreement. Its most important provisions for present purposes are those governing the procedure for changing its terms.

As read literally, the Basic Agreement provides that its terms will remain in effect forever unless (1) *both* parties agree to a change *or* (2) an arbitration panel changes the Agreement's terms. The Agreement invokes a type of arbitration called "interest arbitration." Unlike "grievance arbitration," which involves the interpretation and application of existing contractual provisions, "interest arbitration" involves the creation of new substantive contractual terms, which will govern the parties' future relations.[3] To be more specific, the 1973 Basic Agreement provides:

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[1] In 1947, Boston Elevated Railway was purchased by a public entity, the Metropolitan Transportation Authority (MTA). As a result of the takeover, MTA workers became public employees; Section 19 of the enabling act, Chapter 544 of the Acts of 1947, authorized the MTA to bargain collectively and to submit contract disputes to binding interest arbitration.

[2] In 1964, Congress enacted the Urban Mass Transportation Act, 49 U.S.C. §§ 1601-1613. Under that statute, federal money flows only to state and local public bodies and agencies. 49 U.S.C. § 16 2 (a)(1). In order to take advantage of the available federal funds, the Massachusetts legislature converted the MTA to the MBTA in 1964. Mass. Gen. Laws Ann. ch. 161A. Pursuant to state law, "[t]he authority is authorized and directed from time to time to take all necessary action to secure any federal assistance which is or may become available . . . for any of the purposes of this chapter. . . ." Mass Gen. Laws Ann. ch. 161A, § 29 (cum. supp. 1981). The MBTA is also authorized "to bargain collectively with labor organizations representing employees of the authority and to enter into agreements . . . with such organizations. . . ." Mass. Gen. Laws Ann. ch. 161A, § 19 (cum supp. 1981).

> a) The Basic Agreement and its provisions shall continue in force until December 31, 1975 "and from year to year thereafter unless changes by the Parties" after appropriate notice. (§ 600)
>
> b) After appropriate notice the contract will "be opened up and the change or changes desired shall then be considered . . . ." Upon failure to reach a mutual agreement upon any of the changes desired . . . the same shall be arbitrated as provided for in this Agreement and the Award shall then be entered into and become a part of this Agreement." (§ 601)
>
> c) Arbitration is to be conducted by a "Board of Arbitration selected in a manner provided in Section 103." (§ 100)
>
> d) The Board of Arbitration shall consist of three members, one selected by the Transit Union, one by the MBTA, and the third chosen from a list of five provided by the American Arbitration Association (through a process of successive striking) of "persons experienced in transportation." (§ 103)

As provided in these sections, the Basic Agreement was "opened up" at the end of 1975. The parties could not agree about the changes they had separately proposed, and they proceeded to arbitration. In 1976, the arbitration panel entered an award changing the Basic Agreement in various ways. But the arbitrators did not change the Agreement's procedure for making changes. And, they stated that "all provisions of the Agreement which are not modified by this Award shall continue in effect." They ruled that the Basic Agreement, as modified, would extend through December 31, 1977.

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[3] For a discussion of interest arbitration, see F. Elkouri & E. Elkouri, How Arbitration Works, 47-48, 50-57 (3rd ed. 1973).

At the beginning of 1978, the Basic Agreement was again "opened up." Again the parties could not agree about the changes they had separately proposed. This time, however, they did not proceed to arbitration. In May, the Transit Union sought arbitration—and the MBTA began to prepare for arbitration. But in July, the Massachusetts legislature enacted a statute, Chapter 405 of the General Laws. This statute, designed to hold down rapidly rising transit costs, mandated an arbitration procedure somewhat different from that contained in the Basic Agreement. The Transit Union immediately claimed that Chapter 405 was itself inconsistent with the Basic Agreement; and it insisted upon Basic Agreement-type arbitration. The MBTA believed that Chapter 405 was lawful, and it insisted upon Chapter 405-type arbitration.

The impasse was resolved on August 8, 1979 when the parties entered into a "Memorandum of Understanding." The Memorandum began by stating "that the Articles of Agreement entered into as of January 1, 1973, as amended, shall be further amended as follows." The Memorandum went on to make a host of changes in the Basic Agreement, but it did not change the "interest arbitration" provisions in any relevant respect.[4] The Memorandum extended the

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[4] The Memorandum did change sections 600 and 601 (Basic Agreement provisions governing the procedure for changing the Basic Agreement). These changes, however, dealt only with the *notification* provisions, not the *arbitration* provisions. The Memorandum provides in relevant part:

(Footnote continued on following page)

Basic Agreement as modified by stating "The express term of the Articles of Agreement shall be January 1, 1978, to and including December 31, 1980." In signing the Memorandum, however, the MBTA wrote, "Approved as to form to the extent not inconsistent with Chapter 405 of the Acts of 1978".

At the end of 1980, the Basic Agreement[5] was once again

(Footnote continued from preceding page)

> 4. *Changes in Agreement*
>
> Sections 600 and 601 shall be amended to read as follows:
>
> This Agreement and the provisions hereof shall continue in force and be binding upon the respective parties hereto until and including the thirty-first day of December, 1980, and from year to year thereafter unless changed by the parties. Either of the parties desiring a change in any section or sections of this Agreement shall notify the other party, in writing, that it desires a change at least one hundred and eighty (180) days prior to the thirty-first day of December, 1980, and thereafter, at least one hundred and eighty (180) days prior to the end of each year, which is the thirty-first day of December. Such notification shall include, in writing, all the specific changes desired of either party.
>
> Within ten (10) days of the receipt of notification of desired changes, representatives of the parties shall commence negotiations in an effort to reach a mutual agreement upon the changes desired by the parties.
>
> Upon failure to reach an agreement on all the changes desired by the parties ninety (90) days prior to the expiration of the Agreement, the parties shall submit the disputed issues to final and binding arbitration as provided for in this Agreement, and they shall forthwith take such steps as will assure that the arbitrator will be selected within sixty (60) days prior to the expiration of the Agreement. Nothing herein shall preclude the parties from continuing to negotiate in an effort to resolve their differences during the period, while the procedures for the establishment of arbitration are in process.

[5] Henceforth, unless the context clearly calls for a different reading, references to the "Basic Agreement" should be read to mean the "Basic Agreement (as amended)".

opened up and the parties sought changes. At this point, the legislature, concerned about a possible transit shutdown due to lack of funds, enacted another statute, Chapter 581 of the General Laws. That statute also sought to hold down costs by imposing additional conditions upon the arbitration (and collective bargaining) procedures. The parties immediately reiterated the positions they had taken in 1978. The Transit Union claimed that both Chapters 405 and 581 were illegal and that arbitration must take place in accordance with the Basic Agreement's specified procedure. The MBTA refused to arbitrate except in conformity with Chapters 405 and 581.

The major differences between the two sets of procedures are the following: the Basic Agreement procedure, as previously mentioned, involves three arbitrators. The Transit Union and the MBTA each select one arbitrator. The third, selected by the other two, is to be a person experienced in transportation matters. The arbitration standards used, while unspecified in the Basic Agreement, are presumably those traditionally used in local transit interest arbitration.[6]

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[6] "The standards used by [interests] arbitrators are not pulled out of the air—nor are they artificially created. They are, generally speaking, the very same ones that are used by the parties in their negotiation. . . .

Without question the most extensively used standard in 'interests' arbitration is prevailing practice. . . ."

F. Elkouri & E. Elkouri, *supra* note 3, at 745, 746, 747.

Both the "national comparable cities" standard and area comparisons have been used in the local transit industry. *Id.* at 751 n. 20.

By contrast, the 1978 Chapter 405 procedure requires (1) that mediation precede arbitration,[7] (2) that a single arbitrator who is a resident of Massachusetts and "experienced in state and local finance," conduct the arbitration,[8] (3) that the arbitrator "rely primarily" on nine statutory factors, including "the financial ability of the authority to meet additional costs," and wages, hours and working conditions of comparable Massachusetts employees,[9] (4) that the arbitrator issue a written opinion analyz-

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[7] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19D (cum. supp. 1981).

[8] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19E (cum. supp. 1981).

[9] Mass. Gen. Laws Ann. ch. 161A, § 19F (1976), provided:

The arbitrator shall rely primarily on the following factors in determining the basis for an award:

1. The financial ability of the authority to meet additional costs, which shall include but not be limited to:

a. the statutory requirement of advisory board approval of the authority's fiscal budget;

b. the financial ability of the individual communities and the commonwealth to meet additional costs;

c. the average per capita tax burden, average annual income and sources of revenue within the commonwealth, and the effect of any arbitration award on the respective property tax rates of the cities and towns within the authority's district.

2. The overall compensation presently received by the employees, having regard not only for wages for time actually worked but also for wages for time not worked, including vacations, holidays and other excused time.

3. All benefits received by the employees, including insurance, pension, as well as the continuity and stability of employment.

(Footnote continued on following page)

ing the application of the statutory factors,[10] and (5) that the arbitrator disallow any provision for cost of living adjustments after the expiration of a contract period.[11]

(Footnote continued from preceding page)

> 4. The hazards of employment, physical, educational and mental qualifications, job training and skills involved.
>
> 5. A comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceedings with the wages, hours and conditions of employment of other employees performing similar services within the commonwealth and with other employees generally in public and private employment within the commonwealth.
>
> 6. The average consumer price for goods and services, commonly known as the cost of living.
>
> 7. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.
>
> 8. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between parties, in the public service of the commonwealth.
>
> 9. The stipulation of the parties.

Paragraph 8 was subsequently amended in 1981 by ch. 581. *See* note 14, *infra*.

[10] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19G (cum. supp. 1981).

[11] Mass. Gen. Laws Ann. ch. 161A, § 19G (cum. supp. 1981) provides in relevant part:

> The scope of arbitration shall be limited to wages, hours, and conditions of employment and shall not include any provisions for any cost of living adjustments which are based on changes in the Consumer Price Index after the expiration of the contract period covered by the award. In addition, any wage or salary adjustments shall be expressed in per cent or dollar amounts, and in no case shall there be any provisions for salary adjustments to occur after the expiration of the contract period covered by the award.

Chapter 581,[12] enacted at the end of 1980, forbids the MBTA to bargain collectively or agree with the Transit Union about "inherent management rights." These rights are defined to include the right to hire, promote, assign, direct and discharge employees,[13] to direct and control programs and departments, to determine staffing levels, to assign overtime, to hire part-time employees, and to decide how to procure goods and services. Chapter 581 also forbids the MBTA to agree to pay pensions that are based upon overtime pay or to provide for automatic cost-of-living adjustments. It removed all of these matters from arbitration.[14]

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[12] Codified at Mass. Gen. Laws Ann. ch. 161A, § 19 (cum. supp. 1981). *See* note 14, *infra*.

[13] The MBTA states in its brief on appeal that its employees may be discharged "for cause" and notes that § 102 of the 1973 Basic Agreement provides that "[t]he Authority will exercise the exclusive right to . . . discharge its employees for cause."

[14] As codified at Mass. Gen. Laws Ann. ch. 161A, § 19 (cum. supp. 1981), ch. 581 provides:

> The directors shall have authority to bargain collectively with labor organizations representing employees of the authority and to enter into agreements, with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees; provided, however, that the directors shall have no authority to bargain collectively and shall have no authority to enter into collective bargaining agreements with respect to matters of inherent management right which shall include the right:
>
> (i) to direct, appoint, employ, assign and promote officers, agents and employees, and to determine the standards therefor.
>
> (ii)(A) to discharge and terminate employees subject to the provisions of such clauses (B) and (C).

(Footnote continued on following page)

B

The Transit Union bases its claim that Chapters 405 and 581 are unlawful on two separate constitutional grounds. It makes a conceptually simple "Contract Clause" argu-

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(Footnote continued from preceding page)

(B) No action set forth in (A) shall be sustained if, in a proceeding invoked in accordance with the provisions of such clause (C), the employee shall establish by a preponderance of the evidence that it was based upon race, color, religion, sex, age, national origin, handicapping condition, marital status, or political affiliation or activities or union activities or union organizing of the employees; a reprisal against the employee for disclosure of information by an employee which the employee reasonably believes evidences a violation of any law, rule or regulation or mismanagement, a gross waste of funds, or abuse of authority; a reprisal against any employee for the refusal of any person to engage in political activity.

(C) The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration which may be invoked in the event any employee of the authority is aggrieved by any action taken under such clause (A).

(iii) to plan and determine the levels of service provided by the authority.

(iv) to direct, supervise, control, and evaluate the departments, units, and programs of the authority, to classify the various positions of the authority and ascribe duties and standards of productivity therefor.

(v) to develop and determine levels of staffing and training.

(vi) to determine whether goods or services should be made, leased, contracted for, or purchased on either a temporary or permanent basis.

(vii) to assign and apportion overtime.

(viii) to hire part-time employees.

The authority is hereby prohibited from bargaining collectively or entering into any agreement to make pension benefit

(Footnote continued on following page)

ment. It claims that the Basic Agreement constitutes a contract with the Commonwealth of Massachusetts. Chapters 405 and 581, in its view, unconstitutionally impair the obligations of that contract.[15] The Union also claims that

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(Footnote continued from preceding page)

> payments to its employees that are determined in a manner that includes the amount of overtime earnings of said employees.
>
> The authority is hereby prohibited from bargaining collectively or entering into a contract which provides for automatic cost-of-living salary adjustments which are based on changes in the Consumer Price Index or other similar adjustments unless specifically authorized by law. Except as provided in sections nineteen C to nineteen G, inclusive, the employees of the authority shall submit all grievances and disputes pursuant to arbitration provisions in agreement existing at the time of the creation of the authority or subsequently entered into with the authority or, in the absence of such provisions, to the state board of concilliation and arbitration, or other board or body having similar powers and duties. The provisions of general or special laws relative to rates of wages, hours of employment and working conditions of public employees, shall not apply to the authority nor to the employees thereof, but the authority and its employees shall be governed with respect to hours of employment, rates of wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of its employees by the laws relating to street railway companies.

Chapter 581 also amended ch. 405, Mass. Gen. Laws. Ann. ch. 161A, § 19F (cum. supp. 1981), so that paragraph 8 of that section now provides that

> [t]he arbitrator shall rely . . . on . . . [s]uch other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, factfinding, arbitration or otherwise between parties, in the public service of the commonwealth, and which are not precluded from bargaining under section nineteen.

[15] U.S. Constit. art. I, § 10 provides in relevant part: "no state shall . . . pass any . . . law impairing the Obligation of the Contracts. . . ."

those chapters violate the Supremacy Clause of the Constitution.[16] It argues that they are inconsistent with assurances that Massachusetts gave the Secretary of Labor under the Urban Mass Transportation Act (UMTA), § 13(c), 49 U.S.C. § 1609(c), and that such assurances, given to a federal official, must prevail, as a constitutional matter, over state law to the contrary. A few additional facts about UMTA will help to clarify this argument.

UMTA provides states with federal money to buy and to improve transit equipment and to supplement the operating revenues of local mass transit systems. In 1964 when Congress enacted this law it included in § 13(c) a requirement that, as a condition of obtaining a grant, the Secretary of Labor certify that "fair and equitable arrangements" have been made "to protect the interests of employees affected" by the federal assistance. It adds that these protective arrangements "shall include . . . such provisions as may be necessary for . . . preserving rights, privileges and benefits . . . under existing collective bargaining agreements," continuing "collective bargaining rights . . . ," protecting "individual employees against a worsening of their positions with respect to their employment . . ." and so on.[17]

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[16] U.S. Constit. art. VI, states in relevant part: "the Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

[17] Section 13(c) of UMTA, 49 U.S.C. § 1609 provides:

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such pro-

(Footnote continued on following page)

In applying this provision, the Department of Labor has encouraged transit authorities and unions to submit joint, agreed upon, assurances for review. These assurances are typically referred to as § 13(c) agreements. Over the years, the MBTA and the Transit Union have entered into a series of § 13(c) agreements. The most recent one, entered into on December 10, 1974, has been used repeatedly by the MBTA in grant applications, and by the Department of Labor for certification purposes.

The 1974 § 13(c) agreement includes the following assurances, which are directly relevant here:

> a) "All rights, privileges (including pension rights and benefits) of employees . . . under the existing collective bargaining agreements or otherwise shall be preserved and continued unless changed . . . as provided in said collective bargaining agreements." (§ 3a)

(Footnote continued from preceding page)

tective arrangements shall included, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

> b) "The collective bargaining rights of employees . . . including the right to arbitrate labor disputes . . . , to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued. . . ." (§ 4)
>
> c) "Any . . . labor dispute . . . shall be referred to arbitration in accordance with the arbitration procedures set forth in any then-applicable collective bargaining agreement. . . . The term 'labor dispute' . . . shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions or benefits, . . . the making or maintaining of collective bargaining agreements, the terms to be included in such agreements. . . ." (§ 13(c)(a)(1))[18]

Ever since the enactment of Chapter 405, the Transit Union has claimed that the procedure there set out is inconsistent with this set of assurances and that the assurances must prevail over state law to the contrary.

The MBTA not only has denied that these assurances prevail, as a matter of federal law, over inconsistent state law, but also has denied that these assurances are inconsistent with Chapters 405 and 581. In its view the assurances guarantee the union rights only to the extent that those rights are consistent with current state law; the assurances do not protect the union against *changes* in state law. At the urging of the Department of Labor, the parties submitted the question of the meaning of these assurances to an arbitrator. In 1979 that arbitrator, William Fallon, ruled that Chapter 405 "and the MBTA's insistence on arbitrating interest disputes pursuant to those amendments [i.e. Chapter 405] constitute a conflict with pre-existing § 13(c) agreements executed by the parties." He did not determine which should take precedence. The parties continue to dispute whether the § 13(c) assurances are consistent with Chapters 405 and 581, and if so, which prevail.[19]

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[18] The 1974 § 13(c) agreement is set out in full in the appendix to the opinion of the district court below, 511 F. Supp. 312, 332-340 (D. Mass. 1981).

The parties have brought three separate sets of legal proceedings designed to vindicate their legal position. First, the MBTA challenged Arbitrator Fallon's award in state court. That proceeding is currently pending in the Supreme Judicial Court.[20] Second, the Transit Union brought a proceeding in the Commonwealth Superior Court to require the MBTA to comply with the Basic Agreement's arbitration procedures despite conflicting state law. The Superior Court enjoined violation of various provisions of the Basic Agreement for six months, but it indicated that (at least for the purposes of injunctive relief) the Basic Agreement may, as a matter of state law, have expired.[21] Finally, the Transit Union brought this action in federal district court, seeking a declaration that Chapters 405 and 581 are unconstitutional, and an injunction requiring the MBTA to arbitrate according to the terms of the Basic Agreement.

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[19] We note that initially the MBTA apparently had power to enter into contracts for federal assistance which would impose regulations or practices in conflict with state law. Mass. Gen. Laws Ann. ch. 161A, § 29 (1976) (enacted in 1964) provided broad authority to waive state law in the face of such a conflict and stated in part:

> . . . It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter.

This broad waiver authority was amended and restricted in 1980 by ch. 581, Mass. Gen. Laws Ann. ch. 161A, § 29 (cum. supp. 1981). The language quoted above and other language providing authority to waive state law was repealed. Instead, the legislature provided:

> In the provisions of any federal law, administrative regulation, or practice governing federal assistance for the purposes of this chapter are inconsistent with any provisions of this chapter to the extent that the commonwealth or its political subdivisions are prohibited or potentially prohibited from receiving such assistance, the chairman of the authority shall, within thirty days after the federal government has notified him that an inconsistency may exist, notify the governor, and the clerks of the house and senate of such inconsistency.

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[20] The suit in the Supreme Judicial Court of Massachusetts is a declaratory action pursuant to Mass. Gen. Laws Ann. ch. 231A, seeking a declaration that, *inter alia,* ch. 405 violated the § 13(c) agreement, that the arbitrator exceeded his power in issuing the award, that the arbitrator's award constituted an unauthorized interpretation of state law, and that the award should be vacated.

The Transit Union removed the state action to federal court, 28 U.S.C. § 1441(b); however, it was remanded to the state court for lack of subject matter jurisdiction. *Adams* v. *Massachusetts Bay Transportation Authority,* 79-2059-S (D. Mass. December 24, 1980).

[21] In Superior Court the Transit Union sought to enforce those provisions of the Basic Agreement that rolled over under §§ 600 and 601 against ch. 581. The Superior Court action was brought not only by the Transit Union, but also by Lodge 264 of District 38 of the International Association of Machinists and Aerospace Workers and other unions who sought to enforce alleged rights under their respective contracts. *See Gallahue* v. *MBTA,* Mass. Superior Court, Suffolk County, No. 45917, slip op. at n. 1 (January 7, 1981). For purposes of injunctive relief, the Superior Court enjoined violation of various portions of Lodge 264's collective bargaining agreement until March 2, 1981.

On March 17, 1981, the federal district court issued a preliminary injunction. 511 F. Supp. 312 (D. Mass. 1981). Focusing on "the central mutual consideration of the [1973 Basic] [A]greement and the core of the parties' reasonable expectations," 511 F. Supp. at 317, it held that *portions* of Chapters 405 and 581 violated the Contract Clause of the federal constitution. It found that the remainder of those chapters did not violate the § 13(c) agreement, for it interpreted that agreement as guaranteeing rights only insofar as they are consistent with current state law. It then ordered the parties to arbitrate under a procedure which the court itself created. The court modified the Basic Agreement to incorporate parts of Chapter 405 that it believed were constitutional.[22] The court issued a clarifying order on May 15, 1981.[23] Both sides have appealed this district court decision. The Transit Union claims that the Basic Agreement's provision must be enforced as written. The MBTA claims that Chapters 405 and 581 are constitutional and govern.

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[22] Essentially, the district court ruled that ch. 405 violates the Contract Clause only insofar as it imposed arbitration by a single arbitrator in place of tripartite arbitration. 511 F. Supp. at 317. The court directed that binding interest arbitration be conducted in accordance with ch. 405, "except that three arbitrators shall be chosen as provided in the collective bargaining agreements and the third or neutral arbitrator shall be (1) experienced in transportation, (2) a legal resident of the Commonwealth of Massachusetts, and (3) experienced in state and local finances." 511 F. Supp. at 318.

With respect to Chapter 581, the district court stated that it violated the Contract Clause "[t]o the extent that . . . [it] . . . withdraws questions of substance from collective bargaining . . . ." 511 F. Supp. at 318. The court further held that "Chapter 581 is not applicable, because it conflicts with the essential provisions of a prior agreement, and its applicability is interdicted by Article I, Section 10, of the United States Constitution [the Contract Clause]." *Id.* at 319.

[23] *See* notes 49 and 57, *infra*. In its memorandum of May 15, the district court ruled, *inter alia*, that §§ 8 and 9 of ch. 581 are in conflict with paragraph 4 of the 1974 § 13(c) agreement, and thus with the Supremacy Clause.

D

The basic legal issues before us on appeal, then, are two. First, do portions of Chapters 405 and 581 violate the Supremacy Clause? Do they conflict with the § 13(c) assurances, and, if so, do the § 13(c) assurances prevail? Second, do portions of Chapters 405 and 581 unconstitutionally "impair" the obligations of a prior contract? We must also consider a further and totally different issue arising out of a separate claim made by Lodge 264 of District 38 of the International Association of Machinists and Aerospace Workers ("the Machinists".[24] This separate matter will be considered in Part IV of this opinion.

II

We first consider the Transit Union's claim that Chapters 405 and 581 are unconstitutional under the Supremacy Clause because they conflict with the 1974 § 13(c) agreement. The district court held that no such conflict exists, but here we shall assume the contrary. For one thing, an arbitrator, appointed under the terms of the 1974 Agreement has found that a conflict exists. For another thing, the plain language of the § 13(c) agreement quoted above appears to conflict with the two state chapters. Section 4 of the § 13(c) agreement, for example, states that arbitration rights are protected to the extent they are provided for by "applicable laws and/or existing collective bargaining agreements." Yet, the arbitration procedure set forth in Chapter 405 is arguably less favorable to the union than that contained in the "existing" (1973) "collective bargaining agreement." The district court read the language of § 4 to mean that it protected arbitration rights only insofar as those rights were also protected by "applicable law." 511 F. Supp. at 318-319. But the words "and/or" commonly mean "the one or the other or both." And thus § 4 would seem to protect arbitration rights provided by the 1973 "collective bargaining agreement" even if those rights are not provided for by "applicable law." We believe it reasonable for purposes of this opinion to assume that there is a conflict between state law and federal assurance.

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[24] The Machinists claim that their (separate) collective bargaining agreement prohibits the MBTA from laying off their members. The district court enjoined the proposed lay offs and the MBTA appeals.

The more difficult question is, in case of conflict, which prevails, federal assurance or state law? This is a question of Congressional intent. Barring some constitutional restraint, Congress plainly has the power to enact a law forbidding states that accept federal money from passing laws inconsistent with a federal statute, inconsistent with regulations made pursuant to the statute, or inconsistent with assurances made pursuant to the statute or those regulations. *E.g.*, *King* v. *Smith*, 392 U.S. 309, 333 n.34 (1968). The issue here, therefore, is whether Congress intended § 13(c), or, to be more specific, whether it intended assurances made pursuant to § 13(c), to override conflicting state law. If not, state law governs—although the federal statutory scheme may provide other remedies for violation of an assurance.

The language of the statute does not itself answer the relevant question. It simply provides that '[i]t shall be a condition of assistance . . . that fair and equitable arrangements are made, as determined by the Secretary of

Labor, to protect the interests of employees affected by such assistance." And, it goes on to list certain matters that the "protective arrangements" shall include. 49 U.S.C. § 1609(c). It would be consistent with this language that "arrangements" approved by the Secretary automatically invalidate conflicting state law. It is equally consistent with this language that such "arrangements" do not invalidate state law, but that a state with laws that prevent the making of "fair and equitable arrangements," cannot obtain or retain federal assistance. To decide the Supremacy Clause question, we have examined the UMTA statutory scheme in light of its legislative history and prior case law. Our examination convinces us that Congress intended state law, not § 13(c) assurances, to prevail in case of a conflict. We base this conclusion upon express language contained in the legislative history, upon the fact that a contrary holding risks distorting UMTA's basic purposes, and upon the practical difficulties that would accompany a contrary result.

A

We have examined the statute's legislative history with care. In doing so, we are mindful that the courts ought not to void state statutes—particularly those dealing with local economic matters—in the absence of a clear Congressional intent to preempt them:

> If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of the intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Schwartz v. *Texas*, 244 U.S. 199, 202-203 (1952). *See New York Department of Social Services* v. *Dublin*, 413 U.S.

405, 413 (1973); *cf. National League of Cities* v. *Usery*, 426 U.S. 833 (1976). A careful examination of the legisnative history reveals no evidence of any intent that a § 13(c) assurance supersedes state law; rather, that history reveals the contrary.

1. The first UMTA bills, introduced in Congress in the early 1960's, contained no labor protection provisions. Those provisions, which later became § 13(c), appeared in Congress when Secretary of Labor Willard Wirtz presented them to the Senate and to the House Committees on Banking and Currency in 1963. Secretary Wirtz first pointed out that the Labor Department had drafted the provisions after discussions with the Amalgamated Transit Union and the AFL-CIO. The unions argued that labor protection was needed for two reasons. UMTA money might be used by the states to buy existing private transit companies.[25] Under the law in some states if a private transit system became publicly owned, its workers would lose their rights to strike and to bargain collectively.[26] UMTA funds might also be used for automation leading to

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[25] *See* H.R. Rep. No. 204, 88th Cong., 2d Sess. 4, *reprinted in* [1964] U.S. Code Cong. & Ad. News 2569, 2583; [hereinafter *House Report*]; S. Rep. No. 82, 88th Cong., 1st Sess. 29 (1963) [hereinafter *Senate Report*].

[26] During the hearings on UMTA, labor officials pointed to Dade County, Florida as an illustration of a situation where employees of a privately operated transit system lost their collective bargaining rights when the county took over the operation of the system. *See Urban Mass Transportation—1963: Hearings on S. 6 and S. 917 Before the Subcomm. of the Senate Comm. on Banking and Currency,* 88th Cong., 1st Sess. 324, 325 (1963) [hereinafter *Senate Hearings*] (statement of Bernard Cushman); *Urban Mass Transportation Act of 1963: Hearings on H.R. 3881 Before the House Comm. on Banking and Currency,* 88th Cong., 1st Sess. 487 (1963) [hereinafter *House Hearings*] (statement of Andrew J. Bielmiller).

a loss of jobs.[27] Thus, as Secretary Wirtz explained it, § 13(c) was to provide "transitional" protection.[28]

Second, secretary Wirtz explained how the labor protection provisions work. He made clear that the provisions would give the Labor Department a weapon—in the form of UMTA grants—that could be used to encourage states to modify laws to allow, for example, collective bargaining, or to look for ways around existing anti-union statutes.[29] If a state could not satisfy the Secretary that it had found some lawful method to provide the protection that § 13(c) required, the Secretary would prevent the state from receiving UMTA assistance. Thus, Secretary Wirtz testified that § 13(c) would "affect" state law, but it would not "override" state law.[30]

Third, the Secretary emphasized the breadth of the discretionary power that § 13(c) gave to the Labor Department and the "flexibility" with which that discretion must be exercised.[31] Thus, he told the House Committee that the Labor Department had the need for "flexibility" in mind "when the standards in the proposal were drafted."[32] The provisions provided flexibility both because the standard used—"fair and equitable arrangements"—was a highly general one and because the statute allowed the Secretary to take "account of the fact that different answers may be appropriate in different cases."[33] Indeed, in response to questioning, the Secretary stated that the provision did not even require him to withhold funds from a state with a law prohibiting collective bargaining among municipal employees. Even in such a case he would search for ways to work out arrangements that would allow the state to participate in the program.[34]

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[27] *See* authorities cited at note 25, *supra.*

[28] *Senate Hearings, supra* note 26, at 308.

[29] *See* note 34, *infra.*

[30] *Senate Hearings, supra* note 26, at 312-313.

[31] *House Hearings, supra* note 26, at 482.

[32] *Id.*

[33] *Id.*

Fourth, the Secretary specifically focused upon the question of whether § 13(c) assurances would supersede state law. In response to questioning in the Senate, he said, "I should like it quite clear that I think that there should be no superseding here of the State law."[35] The Senate Committee Report on the Bill subsequently stated,

> In regard to the question as to whether these [§ 13(c)] provisions would supersede State labor laws, the committee concurs in a statement made by the Secretary of Labor "that there could be no superseding of State laws by a provision of this kind."[36]

The Secretary also responded to a question by a Congressman about the relation of § 13(c) to state law by saying that the Labor Department's proposal "is submitted on this basis . . . that the state laws must control."[37] When questioned by Congressman Wilson about whether he anticipated the "need for changes in any State laws in order to qualify any authority for funds under the provisions of the amendment", Secretary Wirtz responded:

> We are not relying upon any such changes, or assuming any such changes. *We are also assuming that the State laws would be controlling in the situation.* But, on the constructive side of my answer, it is also a

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[34] *House Hearings, supra* note 26, at 482-483, 484-485.

[35] *Senate Hearings, supra* note 26, at 313.

[36] *Senate Report, supra* note 25, at 29.

[37] *House Hearings, supra* note 26, at 482.

> responsible determination in the light of experience that there would be few, if any, situations, in which the interests of a community in this program where State laws are applicable and practices applicable to collective bargaining would enter and the interests reflected in this proposed amendment could not and would not be reconciled affirmatively. It would be possible in our judgment to take care of that. (emphasis added)[38]

In sum, as seen by the Secretary of the Department that drafted § 13(c) (as well as by the Senate Committee that reported it), that section, together with UMTA funds, provided the Department with strong, flexible and discretionary power to encourage states to modify or to find ways around state laws or practices that, for example, inhibited collective bargaining. That section, in their view, clearly did not give the Secretary the power to override state law.

2. On the floor of the Senate, Senator Williams, one of the bill's chief sponsors, Senator Sparkman, the Chairman of the relevant subcommittee, and Senator Morse, a leading advocate of labor protection, all stated that § 13(c) was not intended to override state law. The reason for this unusual degree of explicitness is that two senators—Tower and Goldwater—claimed the contrary and sought to eliminate or to modify that section. Senator Tower based his claim upon the fact that the Senate Committee had struck out a provision that would have allowed the "encouragement of collective bargaining rights to the extent not inconsistent with state law." 109 Cong. Rec. 5322, 5415 (1963).[39] He

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[38] *Id.* at 486.

[39] Senator Tower stated:

> Another matter relating to the labor section is extremely important. A number of States have, in one form or another, restrictions prohibiting certain labor activities by employees

(Footnote continued on following page)

was joined by Senator Goldwater (who also sought to strike out § 13(c)).[40] Senator Williams responded to their argument by stating:

(Footnote continued from preceding page)

of the State and its political subdivisions. Would Federal assistance be given to States whose labor laws conflict with the labor provision in this bill? Would the labor provisions in this bill supersede the laws of the various States? The Secretary of Labor indicated there would be no superseding of State law but said the question of whether there would be an effect was a somewhat different question. However, in section 10(c)(2) of the bill, in the language referring to the enforcement of the prevention of curtailment of collective bargaining rights . . . , the words "to the extent not inconsistent with State or local law"—approved in subcommittee—were deleted from the bill in full committee. From this, one can only assume that this measure would be enforced in a manner not consistent with State or local law. . . .

Secretary Wirtz, in referring in his testimony to the situation in Dade County—where, as I have mentioned, there was a loss of collective-bargaining rights, due to the establishment of a new transit system operated by the municipality—said that in the application of Senate bill 6 to situations of that kind:

> There would be a question that would have to be squarely faced, as to whether or not Federal funds should be used in connection with a situation of that kind, unless better arrangements could be worked out for the preservation of collective bargaining rights.

Will State laws be superseded, if not in one way, in another? The question is certainly raised as to whether the Administrator will be forced to deny assistance to certain States. Or would he deny assistance to certain States only until they changed their laws? The point is not at all clear, because no testimony was made available to the committee after the deletion of the words "not inconsistent with State or local law."

109 Cong. Rec. 5322.

[40] Senator Goldwater remarked with respect to § 13(c) (also designated as § 10(c) or § 19(c) in various bills):

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This provision [i.e. § 13(c)] is truly ancillary to the thrust of the transportation program. It is only included in the interest of fairness and equity. If as a result of the expenditure of Federal funds, a railroad employee having a lifetime of contributions to a pension system were to lose it because his railroad was taken over by the public, that would be grossly unfair. This provision protects those rights which have been hard earned and enables t hem to continue.

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The enactment of this provision would represent a complete reversal of the public policy of the United States, which for over a quarter of a century, as enunciated in the Wagner Act and the Taft-Hartley Act, has specifically excluded by definition, any State or political subdivision thereof from all obligations imposed by the Federal Labor-Management Relations Act, including the requirement to bargain collectively with representatives of its employees. Both the Wagner Act and the Taft-Hartley Act have long recognized the right of the States, local governments, and communities to regulate and manage their affairs and their arrangements with their employees free from Federal interference and control.

I might say in this connection, Mr. President, that many States have laws which prevnt bargaining with unions in the area of public employment. This section of the bill would preempt such laws and such ordinances as passed pertinent thereto by the local authorities.

* * *

If this language remains in the bill, I am afraid we shall again be preempting established State laws, city ordinances, county ordinances or laws, whichever pertain.

As I said a moment ago, if the local government wishes to extend the collective bargaining rights, wages, working conditions, and so forth, with no right to strike, that is up to the local government, be it city, county or State; but if the United States moved in with the language contained in subsection (c) of section 19, it would have the effect, I believe, of preempting State law in this area.

109 Cong. Rec. 5415.

> *The legislative history has to be corrected, however, because if the bill shall be enacted, we must have a record that will show that the bill does not preempt State law; it does not control or dominate with irrevocable authority local situations.* The bill provides for the encouragement of collective bargaining. That does not put the force of a mandate on a community. . . . I do not believe we can pass a law which would change State law; and we do not attempt to do so. . . .

Id. at 5417. (emphasis added.)[41] Senator Sparkman

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[41] Following Senator Williams' statement, this exchange ensued:

> Mr. Miller: Is it the intention, so far as the Senator from New Jersey and the committee are concerned, to the best of the Senator's knowledge, that the provision which is the subject of the amendment of the Senator from Arizona shall not be inconsistent with State law?
>
> Mr. Williams of New Jersey: Is that another way of saying that it cannot preempt or be a substitute for State law?
>
> Mr. Miller: I should think so.
>
> Mr. Williams of New Jersey: That is my answer. It was the same answer the Secretary of Labor gave to the committee.
>
> Mr. Tower: Mr. President, will the Senator from Arizona yield, that I may propound a further question to the Senator from New Jersey.
>
> Mr. Goldwater: I yield for that purpose.
>
> Mr. Tower: If that is the case, why did we strike from the bill, reported by the Committee on Commerce, on page 26, line 17, the collective bargaining section: "to the extent not inconsistent with State or local law"?
>
> If it is our intent not to be inconsistent with State or local law, why was that provision deleted?
>
> Mr. Williams of New Jersey: The answer is very simple. The provision should not have been included in the first place. If we had not made a mistake in the first place by doing what was unnecessary, it would not have been necessary to delete that provision.

(Footnote continued on following page)

added a similar view, *id*. at 5418[42] and the effort to strike the section was defeated. *Id*. at 5420.

(Footnote continued from preceding page)

> Mr. Tower: I still do not understand the point in taking it out if, as the Senator has said, it is not the intent to be inconsistent with State law.
>
> Mr. Williams of New Jersey: Must we, in every paragraph of every bill, say, "The action under the authority of this legislation shall be in conformity with the Constitution of the United States"?
>
> Mr. Tower: What reflects legislative intent more clearly than the language which was deleted from the bill?
>
> Mr. Williams of New Jersey: I am sure the Senator knows that if one makes a mistake, he should not try to preserve it. In our legislative history, shall we magnify a mistake which we made together?

109 Cong. Rec. 5417-5418.

[42] Senator Sparkman's remarks, and the reactions of Senators Goldwater and Tower were recorded as follows:

> Mr. Sparkman: . . . I know that the language was written. It was done clearly with the idea that while there would be an encouragement of a continuation of collective bargaining rights, it was not intended to supersede State laws. I believe the questioning of the Secretary of Labor indicates our concern about that. It was not our intention to supersede State laws, and we do not intend, I am sure, to do so. We do not believe that the language has that effect.
>
> Mr. Goldwater: If we are to depend on the Secretary's testimony for legislative history, neither side has much of a leg to stand on, because this language is about as fuzzy-wuzzy as any I have ever tried to read. It reads like some of the texts on proper punctuation, because when one gets through reading it, it is just a lot of language.
>
> Mr. Tower: Actually, the Secretary was testifying on the basis of the language he submitted to the committee, not the language which was finally provided in the bill.
>
> Mr. Sparkman: That is correct.

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Senator Tower then sought to amend § 13(c) to require only arrangements "consistent with the laws of the State in which the project is located." *Id.* at 5421. Again, he argued that without this proviso § 13(c) might override state law. The amendment was defeated, in part, because, as Senator Williams stated again and again, it was unneces-

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> Mr. President, will the Senator from Arizona yield further?
>
> Mr. Goldwater: I yield.
>
> Mr. Sparkman: I admit that in reading the Secretary's answer, there is a chance of someone's misunderstanding it. But if the entire statement is read, I think we find that he clearly said it will not supersede State laws.
>
> He was asked, "Does it affect them?" He replied, "That is different"—and it is. If it has any effect whatever on them, that would be covered by the word "effect." I think the Secretary was splitting hairs when he tried to make that distinction. Of course it might have an effect upon State laws, but even in that connection he repeated his statement that it will not supersede or displace or override them.
>
> Mr. Goldwater: Let me read what Secretary Wirtz said, as it appears on page 313. His statement was made in answer to a question by the Senator from Texas [Mr. Tower]:
>
>> But I should like it quite clear that think that there could be no superseding here of the State law.
>
> But that is not a statement on which one could rely with any conviction. He merely said he thought there could be no superseding of State law. . . .
>
> Mr. Sparkman: Let me point out that at another place Secretary Wirtz said "surely" this amendment would not supersede State laws.
>
> Mr. Goldwater: On what page is that statement to be found?
>
> Mr. Sparkman: On page 312, near the bottom.
>
> Mr. Goldwater: But he added "to the best of my knowledge."

109 Cong. Rec. 5418.

sary: § 13(c) did not supsede state law. *Id.*[43] The real issue at stake(however, was not the question of override; the real issue was whether the Secretary of Labor would have the power to use § 13(c) as a weapon to encourage states to modify anti-union laws or to look for ways around those laws in the case of municipal transit workers (particularly those "acquired" from private companies with UMTA funds.) Senator Tower's amendment would have severely limited the Secretary's power to insist upon changes in state law as a condition for receiving funds—the very power that Secretary Wirtz had sought. The defeat of that amendment allowed him that power. Senator Javits explained the matter clearly:

> The reason I oppose the amendment is that I believe the provisions with respect to labor are in balance now, so far as Senators like myself are concerned. I should like to state my understanding or the situation and why I believe the amendment will complicate it rather than improve it.
>
> My understanding of the amendment is that the Secretary of Labor, under the bill, cannot supersede State law. If State law makes it impossible for the employees of municipal transit systems to bargain collectively, then it makes it impossible. There is nothing in the bill that can override it. Indeed, I doubt that the Constitution will permit it, and I doubt that it can be done under any phase of the Taft-Hartley law.

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[43] Senator Williams also stated:

> To provide specifically that the rights could not be inconsistent with State law would be to imply that without such language there is the possibility of the program being inconsistent with State law which we know is not the fact. If the language is put in, it seems to me, while it might seem a small matter in respect to this bill, it would set a precedent for other legislation, which I think would be dangerous.

Id. at 5423.

> However, what it does, by not mentioning the proposition is to enable the Secretary of Labor . . ., to go into a State where a right-to-work law or some other law deprives the municipal employees—that is, employees of the transit system—of collective bargaining rights. Perhaps because the Administrator has money to give out, some States may be induced to make some accommodation on that score by the necessary exemption from the law or any interstate compact entered into with other States.
>
> Therefore, we have a balanced scheme. We do not override the law; at the same time, we do not compel the Federal Government to go in where the law is adverse to the interest of labor and labor's own point of view, and perhaps also even give encouragement to exempt a situation of this kind where the State desires to get this type of Federal help.
>
> I think that is giving something on both sides, while at the same time not giving the Administrator instructions, which is what the amendment would do, that he must go into such States, notwithstanding the fact that the municipal transit system workers might be deprived of collective bargaining rights.
>
> Therefore, I believe the amendment should be rejected.

109 Cong. Rec. 5422 (1963).

Subsequently, Senator Morse, a strong supporter of labor protection, added that under § 13(c), "The state can continue its state policy if it wishes to; but . . . the State should not be allowed to receive Federal money with which to continue a policy that is in conflict with sound Federal policy." *Id.* at 5672. He added that the final § 13(c) provision "does not supersede any State policy." *Id.* at 5673.

Thus, the Senate debate reveals not a single senator who intended § 13(c) to override conflicting state law. It contains explicit statements by sponsoring senators that they intended the contrary and believed that § 13(c) carries out their intent. The senatorial remarks to the contrary are not supported by legal argument and were made by senators as part of an argument for an amendment that went well beyond removing any direct conflict between § 13(c) and state law.

3. The Senate debate was repeated in the House of Representatives. Some Congressmen articulated fears similar to those of Senators Tower and Goldwater. They feared that the legislation would override state law. *See, e.g.,* 110 Cong Rec. 14979 (remarks of Rep. Taft). The bill's sponsors, however, assured the House that § 13(c) was not intended to override conflicting state law. Thus, Congressman Multer stated that "[n]othing in this bill and nothing in any amendment thus far adopted will infringe upon local law, whether it be of a State or municipality." *Id.* at 14980. And, Congressman Rains argued "that there is not one line in this bill that would vitiate in any way any State or local law. . . ." *Id.*

In sum, the legislative history reveals one explicit statement after another, made by the bill's drafters, the bill's sponsors in the Senate, and those who sponsored it in the House, that § 13(c), while designed to prod the states is not intended to lead to the invalidation of any state law.

B

It might be argued, however, that this legislative history does not dispose of the matter because it does not explicitly consider the effect of § 13(c) on new state law enacted *after* the state has accepted UMTA funds. Indeed, the union here does not argue that § 13(c) assurances override preexisting state law; it claims they override subsequently enacted state law. We do not believe, however, that this distinction is determinative for the following reasons.

First, there is nothing in the legislative history of UMTA suggesting a need to draw this distinction. Rather, the history quoted above suggests that the senators and congressmen who drafted, sponsored, and voted for the bill believed that § 13(c) would not override *any* state law. And, there is no indication at all that both the statute *and* the detailed assurances given pursuant to § 13(c) were intended to predominate in case of conflict.

Second, if as the Transit Union contends, § 13(c) assurances override state law, Congress, in enacting § 13(c), to a significant extent federalized collective bargaining with local transit unions. Section 13(c) assurances consist of detailed documents, negotiated between transit authority and union, containing hosts of conditions related to wages, hours and working conditions—conditions that could govern the relations between the parties for years to come. To give these documents the authority of federal law overriding state law to the contrary would transfer predominate legal authority for local transit labor relations from state to federal government. The statute would have created a federal involvement in local transit labor relations akin to that which now exists with respect to railroad and airline workers. *See generally International Association of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 687 (1963).

Whether or not such a federal presence is desirable, we cannot interpret the ambiguous language of § 13(c) to create it without a fairly clear indication that such was Congress's intent. Unlike railway and airline workers, we are here considering workers for *local* transit companies whose employers, by and large, are municipalities or state governments. *Cf. National League of Cities* v. *Usery*, *supra.* Moreover, in the National Labor Relations Act

Congress explicitly exempted public employees, such as MBTA workers, from federal labor legislation. *See Local Division 589, Amalgamated Transit Union* v. *Amalgamated Transit Union*, 295 F. Supp. 630, 632 (D. Mass. 1969). Had Congress intended to grant the Secretary of Labor NLRB-type (or more) power to override state law governing these local public employees, one would expect to find some indication that Congress at least thought about the matter. But instead, the legislative history is silent. Not a word indicates that Congress intended such a result. The unions in 1963 urged no such outcome.[44]

To the contrary, the legislative history suggests that Congress was sensitive to the local nature of local transit; it "expected that specific conditions [in § 13(c) assurances] normally will be the product of local bargaining and negotiations"; *Senate Report, supra* note 25, at 28; *see House Report, supra* note 25, [1964] U.S. Code Cong. & Admin. News at 2584-2585;[45] and its members made the many statements previously discussed suggesting the legal supremacy of state law.

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[44] Indeed, the prime concern advanced by labor leaders with respect to § 13(c) was that while they agreed with its objectives, it was excessively general. Thus, they proposed a more detailed amendment, which provided, in part, that fair and equitable arrangements "shall be available to all . . . employees and shall not be limited to employees of existing mass transportation systems but shall "include employees employed on any new project, system, line, operation, or facilities. . . ." *House Hearings, supra* note 26, at 494-495 (statement of Andrew J. Bielmiller). In particular, they pressed that a provision be added which would authorize binding arbitration, *id.*, a proposal which was rejected by Congress.

[45] We note, moreover, that the U.S. Department of Labor has recognized the validity of state law in its implementing regulations. 29 C.F.R. § 215.3(a)(2) (1980) provides:

> In instances where state or political subdivisions are subject to legal restrictions on bargaining with employee organizations,

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Third, § 13(c)'s framers intended a limited set of provisional protections. Secretary Wirtz testified that "we are concerned particularly only about the *transitional* effects upon particular employee groups . . . [caused by] consolidation, merger, acquisition of various lines or the establishment of new systems besides or in some cases replacing old systems [or by the] establishment of programs of technological improvement." *Senate Hearings, supra* note 26, at 308 (emphasis added). To erect upon § 13(c) assurances a near permanent set of specific collective bargaining conditions which the state cannot change is to go beyond this limited purpose.

Fourth, to find that specific § 13(c) assurances override state law would also go beyond § 13(c)'s objective of assuring "fair and equitable" arrangements. Clearly, a state law could modify a particular § 13(c) assurance without inevitably bringing about an unfair or inequitable result. It has not been shown, for example, that the new system provided by Chapters 405 and 581 is basically unfair or inequitable; it is simply claimed that those chapters change the 1973 Basic Agreement permanently frozen in detail by the 1974 assurances. Congress's general intent to secure fair arrangements does not require the implementation of any *particular* set of detailed provisions.

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the Department of Labor will utilize special procedures to satisfy the Federal statute in a manner which does not contravene state or local law. For example, employee protective terms and conditions, acceptable to both employee and applicant representatives, may be incorporated into a resolution adopted by the involved local government.

Indeed, if the specific detailed provisions of a § 13(c) assurance prevail over *any* conflicting change in state law, the Secretary of Labor would lose any ongoing power to exercise discretion—to decide whether or not a change makes the state system as a whole unfair to the transit workers. This result would be anomalous given a legislative history stressing the need for flexibility and discretion. *See* note 34. *See also Kendler* v. *Wirtz,* 388 F. 2d 381, 383 (3rd Cir. 1968); *City of Macon* v. *Marshall,* 439 F. Supp. 1209, 1223-1224 (M.D. Ga. 1977).

Fifth, § 13(c) assurances need not override state law to make § 13(c) enforceable. The threat of receiving no further UMTA funds would often prevent a state currently receiving those funds from changing its laws contrary to the policy of § 13(c). If not, the Secretary might halt the flow of funds or take other appropriate action. In any event, such an enforcement scheme is more consistent with Congressional intent than the alternative urged upon us by the Transit Union; namely, that § 13(c) permanently binds states to the details of § 13(c) assurances and referenced collective bargaining agreements entered into perhaps a decade earlier, regardless of whether changes in state law are, in any overall sense, unfair. Even if such a system is desirable, the legislative history of UMTA suggests that Congress did not intend to create it.

C

The Transit Union has cited several cases that it believes stand for the proposition that § 13(c) assurances supersede state law. We have found no case, however, which is both directly on point and which considers the issue in detail. The Union cites many cases which deal with *other* federal statutes. These include *International Association* *of Machinists* v. *Central Airlines, Inc.*, 372 U.S. at 689-91 (§ 204 of the Railway Act, 45 U.S.C. § 184); *Ivanhoe Irrig. Dist.* v. *McCracken,* 357 U.S. 275, 291-294 (1958) (Reclamation Act of 1902); *International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283, 297-297 (1959) (§§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158); *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 456-457 (1957) and *Teamsters Local* v. *Lucas Flour Co.,* 369 U.S. 95, 102-103 (1962) (substantive law to be applied in suits under § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 184). In each of these cases, the Court held that federal law is preemptive. Yet, these cases are not persuasive here where we deal with a different statute, with different statutory objectives, and with a different legislative history.

Most of the UMTA cases cited by the Union do not deal with the precise question here at issue. Thus, in *Local Division 714, Amalgamated Transit Union, AFL-CIO* v. *Greater Portland Transit District,* 589 F. 2d (1st Cir. 1978) we decided a jurisdictional question. We held only that a union "does have a federal cause of action, implied from UMTA § 13(c), to enforce the labor protective arrangements to which the [Greater Portland Transit] District agreed to as a condition of federal financial assistance under the Act." 589 F. 2d at 16. We further noted that future "enforcement litigation will surely involve interpreting the protective arrangements in light of the purposes and policies of § 13(c), as well as resolving issues relating to the interplay between federal and state labor policies and possible supremacy clause problems." *Id.* at 13. We did not decide the question of whether § 13(c) requires that state law be subordinated to § 13(c) assurances. The Transit Union has cited language in that case that might imply such subordination. To the extent that it does so, however, we hereby disapprove it.

Several other cases cited also deal with the same jurisdictional question at issue in *Greater Portland.* Thus, the Sixth District, *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Authority,* 650 F. 2d 1379 (6th Cir. 1981), the Seventh Circuit, *Local Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility,* 585 F. 2d 1340 (7th Cir. 1978); and the Eighth Circuit, *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority,* 582 F. 2d 444 (8th Cir. 1978), *cert denied,* 439 U.S. 1090 (1979), also reached the conclusion that a claim of breach of a § 13(c) agreement sets forth a dispute cognizable in federal court,[46] in none of these cases did the court explicitly explore the problem of a conflict with a state law, and in none did the court decide whether, as a matter of general principle, assurances provided under § 13(c) govern in the face of a conflicting state statute.

We recognize that there are dicta in *Jackson* and *Kansas City Area Transportation Authority* which appear to support the Transit Union's position.[47] And, subsequent

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[46] Similarly, *see Division 1235, Amalgamated Transit* v. *Metropolitan Transit Authority,* 650 F. 2d 1389 (6th Cir. 1981); *Division 1212, Amalgamated Transit Union* v. *Chattanooga Area Regional Transportation Authority,* 483 F. Supp. 37, 39 (E.D. Tenn. 1979).

[47] In *Jackson, supra,* the Sixth Circuit stated:

> It is undisputable that Section 13(c) reflects national labor policy. See 109 Cong Rec. 5670. Indeed, the legislative history reveals that several senators were concerned about possible conflicts between Section 13(c) and state law, particularly in the area of the right to strike. *Id.* at 5672-73. Senator Morse,

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to the decision of the Eighth Circuit, a district court ruled, in an alternative holding, that where state law and a

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> the chief sponsor of the bill which became Section 13(c), assured his colleagues that state laws forbidding public employee strikes would supersede national labor policy, but *only* where the right to strike was concerned; *all other* collective bargaining rights would be protected. *Id.* at 5671-73. . . .
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> * * *
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> *Jackson* points out, correctly, that Section 13(c) was designed to encourage flexibility in formulating labor protective "arrangements." Senator Morse himself suggested that if local law prohibits collective bargaining by municipal employees, alternative solutions such as entrusting management of the transit authority to a private commission which *could* legally bargain with the union might be explored. *See also* Department of Labor Guidelines, 43 F.R. 13558 (3-31-78). The point, of course, is not that Congress was willing to make allowances for local problems. Rather, the point is that to qualify for federal funds, municipalities *must*, one way or another, undertake to protect the collective bargaining rights required by national labor policy.

650 F. 2d at 1385-1386.

In a similar vein, the Eighth Circuit has stated:

> We recognize that under the laws of some states employees of public agencies are not accorded collective bargaining rights nor do they enjoy the benefits of such bargaining, including arbitration. We think, however, that when a state or a combination of states forms a public transit agency for the express purpose of obtaining federal money to enable it to take over the business of a private transit company, and where the agency in order to obtain the money enters into a § 13(c) agreement that calls for interest arbitration, the obligation to arbitrate is binding on the agency, regardless of general state law or policy.

Because the opinions do not explore the precise nature of the conflict between state statutes and federal assurances, we are uncertain of the extent to which their language directly conflicts with our holding here.

§ 13(c) agreement are in conflict, state law must yield. *Division 1287* v. *Kansas City Area Transportation Authority,* 485 F. Supp. 856, 863-864 (W.D. Mo. 1980). *But see generally Division 580, Amalgamated Transit Union* v. *Central New York Regional Transportation Authority,* 556 F. 2d 659, 662 (2d Cir. 1977) (suggestive of support for proposition that state law need not yield when in conflict with § 13(c) agreement). Several unpublished opinions also lend support to the Transit Union's position. None of these opinions, however, consider the issue in depth, and we have determined not to follow them.

For these reasons, we hold that the specific detailed assurances given by a union and a transit authority to the Labor Department under (UMTA) § 13(c) do not invalidate a state law to the contrary.

III

The Transit Union also claims that Chapters 405 and 581 are unconstitutional because they impair the obligations of the 1973 Basic Agreement, thereby violating the Contract Clause of the United States Constitution. ("No State shall . . . pass any . . . law impairing the Obligation of Contracts. . . ." Art. I., § 10.) The MBTA disputes the district court's holding that portions of Chapter 405 and all of Chapter 581 violate the Contract Clause. We agree with the MBTA that these chapters do not violate the Clause.

For one thing, the Basic Agreement may well have expired before Chapter 405 and 581 took effect. Although language in the Agreement appears to extend it indefinitely into the future, a Massachusetts state court recently held that, at least for purposes of injunctive relief, the agreement has terminated. On January 7, 1981, the Massachusetts Superior Court, per Judge Young, stated that the Transit Union contract (among others) contains:

> language implying that the prior contract provisions remain in effect until a new contract is negotiated. For injunctive purposes, the Court concludes that it is unreasonable to interpret these provisions so as to continue the prior provisions forever. . . . Accordingly, for purposes of granting injunctive relief, this Court shall set a six month period to injunctive relief granted on the basis of such contracts since this seems a reasonable time within which the parties may renegotiate them.

Gallahue v. *MBTA*, Mass. Superior Court, Suffolk County No. 45917, slip op. at n.1 (January 7, 1981).[48] On July 1, 1981, Judge Young denied plaintiff's motion to extend the injunction, presumably on the ground that the collective bargaining contract was no longer in effect. If Judge Young's opinion constitutes an authoritative interpretation of the Basic Agreement, the Contract Clause would not be violated, for Chapters 405 and 581 apply only to future negotiation,[49] when the Basic Agreement would no longer be in effect. It has been clear since 1827 that the Clause applies only to laws with retrospective, not prospective, effect. *Ogden* v. *Saunders*, 12 Wheat. 213 (1827). *See also* Schwartz, *Old Wine in Old Bottles: The Renaissance of the Contract Clause*, [1979] *Supreme Court Rev*. 95, 99.

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[48] *See* note 21 *supra.*

[49] Defendants have stated that the laws here at issue are designed to apply to MBTA contract negotiations subsequent to their enactment.

The federal district court also suggests in its supplementary memorandum of May 15, 1981, that the Contract Clause problem may no longer exist because the Commonwealth had asserted on May 13, 1981, "that the parties have agreed to terminate the 1973 agreement and write a new one." As the court goes on to note, however, the record is unclear on this point—and the Transit Union has asserted in this court that as far as it is concerned, the collective bargaining agreement remains in effect.

For another thing, even if the Superior Court's decision is not to be taken as a definitive state interpretation of the Basic Agreement, there are strong reason for believing that the Agreement should be given this interpretation for purposes of applying the federal contract clause. Ever since the *Charles River Bridge* case, it has been the law that public contracts are to be strictly construed in favor of the state. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420 (1837); Schwartz, *supra*, at 99. In holding that a company's charter to operate a toll bridge did not bar the state from authorizing the construction of a competing free bridge, the Supreme Court stated: "'[A]ny ambiguity in the terms of the contract must operate against the [company] . . . and in favor of the public'." 11 Pet. at 543, *quoting Stourbridge Canal* v. *Wheely*, 2 B. & Ad. 793. Similarly, the Court has written:

> Every reasonable doubt is to be resolved adversely [to the private party claiming under the contract]. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare.

Fertilizing Co. v. *Hyde Park*, 97 U.S. 659, 666 (1878). This doctrine illustrates the deference that federal courts must pay to state legislation if the Contract Clause is not to become a serious obstacle to the enactment of social or economic legislation that the states believe is necessary.

It is possible to interpret the terms of the Basic Agreement in a way that suggests the Agreement has terminated. Of course, if taken literally, the language of the Agreement would make it perpetual. Sections 600 and 601 of the 1973 Basic Agreement were amended by the Memorandum of Understanding (the 1979 collective bargaining agreement)[50] to provide that the Agreement will continue in force until December 31, 1980, "and from year to year thereafter unless changed by the parties." A party desiring change shall give notice, and if no agreement is reached on those proposals, "the parties shall submit the disputed issues to final and binding arbitration as provided for in this Agreement." This language literally requires perpetual use of the 1973 arbitration system. It would prevent either party from *ever* denouncing the Agreement through termination and seeking a totally new one, no matter how unsatisfactory it found the 1973 arrangement.

It is difficult to believe that the parties to the agreement thought they could bind their successors forever. Perpetual contracts would seem to be particularly inappropriate in the field of labor relations, where fluctuating economic circumstances ordinarily call for the ability to adapt to changes.[51] *See generally* D. Bok and J. Dunlop, Labor and the American Community 289 (1970) (unpredictable nature of long-term agreements). And, it seems unlikely that the parties in 1973 or 1979 believed that they had found a permanent solution to the MBTA's labor/management problems or that they thought they had prevented both the state and the Transit Union from ever again exercising their respective powers to achieve some other accommodation with changing realities. The parties were presumably aware that a perpetual agreement was unlikely to be enforceable at law. Not even in the area of property law—an area where legal relationships are traditionally stable and certain, have the courts allowed private parties to make arrangements lasting in perpetuity. *See* Restatement of the Law of Property § 370 (1944). State courts have interpreted commercial contracts that apparently called for perpetual arrangements, not to do so. *See Simons* v. *American Dry Ginger Ale Co., Inc.,* 335 Mass. 521, 524, 140 N. E. 2d 649-665 (1957). And, where such an interpretation has proved impossible in public collective bargaining agreements, they have struck such provisions down as contrary to public policy. *See, e.g., Niagara Wheatfield Administrators Association* v. *Niagara Wheatfield Central School District,* 385 N.Y.S. 2d 667, 669-670 (4th Dept. 1976). Massachusetts courts have recognized the particularly strong public interest at stake where government labor contracts are at issue; and, they have indicated their willingness to strike down or interpret away provisions in such contracts that run contrary to public policy, by, for example, imposing undue restrictions upon the freedom of action of public authorities. *See School Committee of Boston* v. *Boston Teachers Union,* Mass. , , 389 N. E. 2d 970, 973-974 (1979); *Watertown Firefighters* v. *Watertown.* Mass. , 383 N. E. 2d 494, 498, n.15 (1978).

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[50] *See* note 4 *supra*.

[51] Indeed, other "public employees" in Massachusetts are limited to collective bargaining agreements for a term not to exceed three years. Mass. Gen. Laws. Ann. ch. 150E, § 7 (cum. supp. 1981).

Under these circumstances, the fact that the Basic Agreement is silent as to the parties' authority to terminate completely or to denounce the contract (as contrasted with the power to "change" the contract) might well be interpreted to allow them to do so. Consistent with the express language, the interest arbitration provision might be interpreted as forbidding total termination of the contract only *for a reasonable time* after expiration of the contract's express term—in this instance December 31, 1980. Under any such interpretation of the contract—similar to that apparently reached by the Massachusetts Superior Court—there is no contract clause problem present here.

Nonetheless, it is conceivable that state courts reviewing the Basic Agreement in related cases will reach a different conclusion. Because of the need for expeditious resolution of this litigation, we have also considered the Contract Clause question on the assumption that the "perpetual duration" provisions of the Agreement are to be read literally. In that case, the narrow question before us is whether two subsequently enacted state laws (Chapters 405 and 581) can constitutionally override those provisions of the contract that provide for indefinite (or perpetual) extension (or renewal) of the contract's terms. We believe that they can.

The Contract Clause does not make unlawful *every* state law that conflicts with *any* contract that contains terms contrary to its provisions. Any such interpretation would make of the clause an insuperable barrier to necessary state legislation. It would threaten to make the Constitution unworkable. *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 428, 434-435, 443 (1934).[52] As the Supreme Court has stated, "literalism of the construction of the contract clause . . . would make it destructive of the public interest by depriving the state of its prerogative of self-protection." *W. B. Worthem Co.* v. *Thomas*, 292 U. S.

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[52] *See generally* Comment, *Revival of the Contract Clause: Allied Structural Steel Co.* v. *Spannaus and United States Trust Co.* v. *New Jersey*, 65 Va. L. Rev. 377, 381-385 (1979).

426, 433 (1934). Thus, the courts have interpreted the clause so as to harmonize the state's need to legislate in the interests of its citizens with the need to protect investors and other contracting parties against repudiation of a debt or obligation. In doing so, at least since the early 1930's, they have struck down state laws only infrequently.[53]

In applying the clause, courts have examined the strength of the relevant interests of the private parties and those of the state. They have considered the nature of the private party's investment, which could take the form of labor as well as capital: to what extent has a party *worsened his pre-existing circumstances* by entering into, and relying upon, the contract? Moreover, the courts have examined the extent to which the party might reasonably have relied upon enforcement of the contractual promise in order to protect his investment. Thus, it is not surprising that the courts have upheld laws where these interests are likely to be weak, such as where a law would have basically prospective application, *Ogden* v. *Saunders, supra,* or where a retrospective law would modify, not substantive rights, but pre-existing contractual remedies. *Penniman's Case,* 103 U. S. 714 (1881). *See Worthem Co.* v. *Kavanaugh,* 295 U. S. 56, 60 (1935); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. at 434 n.13 (collecting "remedy" cases); *Mason* v. *Haile,* 12 Wheat. 370 (1927). *See also Sturgis* v. *Crowninshield,* 12 Wheat. 122, 200, 201 (1819). As the Supreme Court recently stated, "a reasonable modification of statutes governing contract remedies is much less likely to upset expectations than a law adjusting the express terms of an agreement." *United States Trust Co.* v. *New Jersey,* 431 U. S. 1, 20-21 n.17 (1977).

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[53] Until very recently, some commentators considered the clause a "dead letter". *See* G. Gunther, Cases and Materials on Constitutional Law 554 (10th ed. 1980); Schwartz, *supra* at 95-96.

Courts have also examined the type of legislation at issue to determine the importance and strength of the state's interest in legislating. *See, e.g., Stone* v. *Mississippi,* 101 U. S. 814, 817-818 (1880). They have frequently held that contracts are impliedly limited by, and subject to, the implicit authority of the state to exercise its "police power." *E.g., Allied Structural Steel* v. *Spannaus,* 438 U. S. 234, 241 (1978); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. at 435-436; *Stone* v. *Mississippi,* 101 U. S. at 817. And, the Supreme Court has defined "police power" for Contract Clause purposes, "as an exercise of the sovereign right of the Government to protect the lives, health, morals, comforts, and general welfare of the people. . . ." *Manigault* v. *Springs,* 199 U. S. 473, 480 (1905). The state's "paramount authority . . . is not limited to health, morals and safety. It extends to economic needs as well." *Viex* v. *Sixth Ward Ass'n,* 310 U. S. 32, 39 (1940). This doctrine reflects the importance of allowing states to legislate freely on social and economic matters of importance to their citizens, modifying the law to meet changing needs and conditions.

Following this doctrine, and of direct relevance here, the Supreme Court has upheld state laws that invalidated prior contractual obligations in the field of transportation; *see, e.g., New Orleans Pub. Serv.* v. *New Orleans,* 281 U. S. 682 (1930); *Denver & R.G.R. Co.* v. *Denver,* 250 U. S. 241 (1919); *Atlantic Coast Line R. Co.* v. *Goldsboro,* 282 U. S. 548, 558 (1914); *Northern Pac. R. Co.* v. *Duluth,* 208 U. S. 583, (1908); and, it has upheld newly enacted state labor laws that specifically set aside previously existing contracts to the contrary. *See, e.g., American Federation of*

Labor v. *American Sash Co.,* 335 U. S. 538, 540 (1949); *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.,* 335 U. S. 525, 531-32 (1949).

An examination of the relevant interests in this case suggests those of the Transit Union are weak and those of the Commonwealth of Massachusetts correspondingly strong. For one thing, the Transit Union could not *reasonably* have relied upon the continued enforcement of the arbitration provision in the Basic Agreement as necessary protection for the investment of labor by its members. The very uncertainty as to the legality under state law of a contractual arrangement purporting to be perpetual would make reliance upon its lasting unreasonable. *See* p. 44 *supra.* Moreover, the contractual provisions at issue here are concerned with the form of the arbitral process and the procedure for determining wages, hours and working conditions; the provisions themselves do not set those terms.[54] They are thus procedural and therefore more akin to a contractual remedy than a contractual right. The Transit Union and its members cannot easily say what terms will result from the new procedure; or how those terms will differ from those that the prior procedure would have provided. They may fear the new procedure will lead to less favorable substantive terms; but so may creditors have feared that changes in contractual remedies (*e.g.* abolition of imprisonment for debt) would make it harder to collect their debts. Yet due to the diminished nature of the reliance involved, such procedural changes in remedy have long been allowed. *See* cases cited at p. 47, *supra.* Further this is not a case of investment given to the state with the expectation of the state returning it, securing its return, or returning an equivalent value through the enforcement at issue. The Transit Union's members have received the pay and working conditions they bargained for and in return for which they gave their labor. It is difficult to see how the promise that a particular arbitration procedure would be used indefinitely into the future—beyond the life of the express terms of the existing agreement—could have played more than a small role in an employee's decision to work for the MBTA. Finally, the Commonwealth, as far as possible, has sought to protect reasonable reliance and expectations by applying the laws at issue here only to future negotiations, when contracts expire subsequent to the enactment of those lows.[55]

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[54] And, the procedure was itself subject to change through use of the arbitration system.

For another thing, the state's interest in legislating in this area seems sufficiently strong to overcome the prior contract's restraints. Public transportation is vital to the state and to its economy. The difficulties of finding satisfactory methods for resolving labor disputs—particularly in the field of public employment—are well known. D. Bok & J. Dunlop, *supra* at 228 *et seq.* The state plausibly claims that the problems of cost and efficiency are great. One piece of legislation at issue here (Chapter 405) was enacted after a long impasse in bargaining, and the other (Chapter 581) was enacted during a period of fiscal emergency as part of a government effort to keep the system from closing down. The state's interests here would seem at least as great as those present in other cases where the Supreme Court upheld a state law's validity. *See, e.g., Stone* v. *Mississippi, supra* (state forbids lottery despite its grant of a twenty-five year lottery franchise to a firm three years earlier); *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U. S. 502 (1942) (state law altered a municipal bond contract); *El Paso* v. *Simmons,* 379 U. S. 49 1(1965) (state law modified a land-sale contract by reducing redemption period); *Fertilizing Co.* v. *Hyde Park, supra* (state law rendered company charter valueless); *Atlantic Coast Line R. Co.* v. *Goldsboro, supra* (state law restricted railway's contractually granted right to operate).

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[55] By contrast, in *Subway-Surface Supervisors Ass'n* v. *New York Transit Authority,* 44 N.Y. 2d 101, 375 N.E. 2d 384, 404 N.Y.S. 2d 323 (1978) and in *Sonoma County Organization of Public Employees* v. *County of Sonoma,* 23 Cal. 3d 296, 152 Cal. Rptr. 903, 591 P. 2d 1 (1979), the challenged legislation applied to the financial terms of existing contracts. In the former case, the legislation was upheld as "a necessary and appropriate" measure in a time of emergency. 44 N.Y. 2d at 113, 375 N.E. 2d at 390, 404 N.Y.S. 2d at 329. In the latter case, the court struck down the statute, finding, *inter alia,* that no "emergency" existed.

Moreover, it should be kept in mind that the state laws before us interfere with a prior contractual promise only to the extent that the promise would seek to prevent the state from *ever* changing the arbitration system. In other words, the narrow issue we are considering is whether the state can override a promise by one of its authorities made several years before that ties the hands of all future legislatures in an area of great importance to the public, concerning serious problems (labor/wage/cost/efficiency negotiations) where few would claim to have found even a provisionally satisfactory answer, let alone a permanent one. The Supreme Court has written that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *United States Trust Co.* v. *New Jersey,* 431 U. S. at 23. We do not believe that the Contract Clause grants the MBTA authority to restrict so significantly the power of future state legislatures.[56]

The Transit Union has pointed out, however, that recently the Supreme Court, in *United States Trust Co.* v. *New Jersey* wrote that a state law impairing the state's prior contractual obligation is valid only if "it is reasonable and necessary to serve an important public purpose." 431 U. S. at 25. *See also Allied Structural Steel* v. *Spannaus,* 438 U. S. at 243-244, 247. The Union agrues that Chapters 405 and 581 are not "reasonable and necessary" because there are other methods available—fare increases for example, that will resolve the MBTA's financial problems. The issue that the Union's claim puts before us is the extent to which we are to defer to the state legislature's judgment on these matters.

If we judge the legislature's actions "in the light of the facts made known or generally assumed," *cf. United States* v. *Carolene Products Co.,* 304 U. S. 144, 152 (1937), those actions are supportable. The legislature clearly felt that Chapters 405 and 581 represented a necessary response to the problems before it. We cannot disagree. The record here reveals the seriousness of the problems facing the MBTA and the alternatives that had been tried. We are aware, as the Supreme Judicial Court has pointed out, that the financial crises which beset the MBTA in late 1980 "threatened the availability of essential services of transportation to such an extent as to endanger the health, safety and welfare of the community." *MBTA Advisory Board* v. *MBTA*, Mass. Adv. Sh. (1981) 403, 407. The complex controversies revealed by the conflicting affidavits filed in the district court themselves, suggest that there is no "obvious" alternative to the legislature's approach. Thus, even without engaging in the normal presumptions favoring state legislation, *cf. Morse* v. *Boston*, 253 Mass. 247, 252, 148 N. E. 913, 815 (1925), we would conclude that a legislative judgment that these statutes are both reasonable and necessary is itself a reasonable judgment.

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[56] *Cf. School Committee of Boston* v. *Boston Teachers Union,* 389 N.E. 2d at 973: "Public policy . . . may limit the ability of a public employer . . . to bind itself to a given contractual provision or to delegate to an arbitrator the power to bind it."; *City of Taunton* v. *Taunton Branch of Mass. Police Ass'n,* 406 N.E. 2d 1298, 1302 (Mass. App. Ct. 1980) (legislative wariness of imposing arbitration).

We do not believe that *United States Trust* requires the federal courts to go further to reexamine *de novo* all the factors underlying the legislation and to make a totally independent determination about whether a fare increase or some other alternative would have constituted a "better" statutory solution. It is true that language in *United State Trust* suggests moderately close court scrutiny of legislation that conflicts with prior *public* contracts. To be specific, the Court stated that as to *private* contracts, "in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure. . . ." 431 U. S. at 22, 23. But, as to *public* contracts, "complete deference to a legislative assessment of reasonableness and necessity is not appropriate. . . ." 431 U. S. at 26. This language itself, however, refers only to the need to avoid "complete" deference, and it is to be contrasted with the dissent's claim that in Contract Clause cases there should be "unusual" deference to the lawmaking authority of state governments. 431 U. S. at 46 (Brennan, J., dissenting). The very existence, and nature, of the complex factual controversies revealed in the record before us here support the legislature's judgment even without "complete" deference.

More importantly, *United States Trust* limits its stricter "review" approach to state laws in the "financial" area—laws which impair a state's "financial obligations." Indeed, it characterized the promise before it as "purely financial." 431 U. S. at 25. And, it specifically distinguished "as a threshold matter" state actions in other areas which might "fall within the reserved powers that cannot be contracted away." 431 U. S. at 24-25. In interpreting this language, we note that the *United States Trust* facts presented a paradigm of the type of protection that the Contract Clause was designed to offer—a protection given to those who invested money, time and effort against loss of their investment through explicit repudiation. *See* B. Wright, *The Contract Clause of the Constitution* 15-16 (1938); Hale, *The Supreme Court and the Contract Clause,* 57 Harv. L. Rev. 512 (1944). Unlike that case, there is no evidence here of any unreasonable effort to impose the costs or burdens of a new legislative policy upon a small group of previous investors, by, for example, depriving them of their investment. There is no reason to examine these provisions under the strict standard applied when rights specifically protected by the Bill of Rights or minority rights protected by the fourteenth amendment are at stake. *See Dandridge* v. *Williams,* 397 U. S. 471, 848 (1970).

Finally, it would be unusually difficult for a federal court to conduct a trial and determine *de novo* the reasonableness and necessity of each detailed provision of these statutes. The difficulties are well illustrated by the affidavits that the parties have submitted. The MBTA, for example, claims that salaries of MBTA workers in every job category are significantly higher than those of Massachusetts state and municipal workers doing comparable work (*e.g.,* MBTA clerk/typists and janitors earn 92 percent more than comparable state employees; machinists earn 84 percent more than comparable state employees; in 1979, two carshifters, one surface operator, one trackman, and one portable compressor operator each earned over $40,000, of which over $20,000 was overtime pay); that the average MBTA employee earns 79 percent more than the average manufacturing industry worker in Massachusetts; that the MBTA's cost per mile is 83 percent higher than the next most inefficient system; that the MBTA lacks flexibility to adjust job assignments or reclassify employees to meet changing needs; that "featherbedding" is rampant; that the MBTA is required to pay overtime rates to an employee during any day he works more than eight hours, even if he does not work more than forty hours that week; that restrictive work rules require the MBTA to hire full-time people for part-time jobs; and that the MBTA is unable unilaterally to subcontract out work. The MBTA also claims that its efforts to deal with these problems through the established collective bargaining arbitration procedures have proven unsuccessful; and, according to a former chairman, changes in work practices could obviate the need for a fare increase.

The Transit Union strongly denies these allegations. Its affidavits set forth contrary claims. It claims, for example, that the MBTA has not been unsuccessful under existing interest arbitration; that the MBTA has failed to use the bargaining and arbitration processes properly to deal with its problems, that the financial dependence by the MBTA upon tax revenues is largely a result of inadequate farebox revenues; that union work practices are not inflexible; that the MBTA work force is efficient; that the MBTA has been able to subcontract out work, and that the MBTA enjoys above average productivity from its workers.

The district court was able to make a few findings about work rules insofar as the parties could agree about the facts.[57] But to go further and resolve disagreements, the court might well have to pass judgment upon such matters as a proper rate of pay, the way differently constituted arbitration tribunals are likely to function, the ease, as a political matter, of raising taxes or fares, the likely social and economic effects of a fare increase, the pressures (social and economic) that could lead to serious labor unrest, and so on. Answering these sorts of questions, and thereby determining the "reasonableness and necessity" of a particular statute, is a task far better suited to legislators than to judges. Thus, in the case before us, where economic or social legislation is at issue, some deference to the legislature's judgment is surely called for.

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[57] In its supplementary memorandum of May 15, 1981, the district court stated:

> . . . There appears to be no dispute . . . about the existence of the following work rules for whatever significance they may have:
>
> a. Management may not make temporary reassignments of employees to jobs at locations different from their regular assignment.
>
> b. Employees may not be temporarily reclassified to meet unexpected needs.
>
> c. Rapid transit vehicles within a storage yard must be moved by a yard motorman and may not be moved by the regular operators of the vehicles even if there are not enough yard motormen on duty at a particular time. The yard motormen do not do any other work.
>
> d. Employees may not be assigned to two "details".
>
> e. Overtime is paid on the basis of an eight-hour day rather than a 40-hour week, and in any case must first be offered to senior employees on a system-wide basis. An employee may receive overtime without having worked a full 40-hour week.
>
> f. There is system-wide bidding for jobs on the basis of seniority.
>
> g. Motormen must be assigned to rail maintenance vehicles, but do not operate the vehicle or participate in maintenance.
>
> h. Schedules once assigned may not be changed to meet shifting rider demands, except on a three-month basis.
>
> i. Penalties must be paid to drivers on split runs if the break exceeds two hours. MBTA pays $2.6 million per year in such penalties.
>
> j. There are restrictions on the hiring of part-time drivers.
>
> I make no findings with respect to the effect of the foregoing work rules, or the justification for them, concerning which I have not heard evidence or argument. Furthermore, I express no opinion as to the relevance of any of the above work rules to any issue before me or before the Court of Appeals.

In sum, given the small amount of reliance that the Transit Union could reasonably have placed upon the perpetual continuation of the Basic Agreement, the importance of preserving the state's power to legislate in this area, the apparent reasonableness and necessity of the legislation, and the state's efforts to apply the statutes prospectively, thereby minimizing their interference with the parties' reasonable expectations, we hold that Chapters 405 and 581 do not violate the Contract Clause even if, as a matter of state law, the Basic Agreement is still in effect.

IV

We now turn to the different claim of the other appellee in this case, Lodge 264 of District 38, International Association of Machinists and Aerospace Workers (the "Machinists"). On July 1, 1976, the Machinists and the MBTA entered into their most recent collective bargaining agreement. Article II provided:

> The term of this Agreement shall commence as of January 1, 1976, and shall extend to and include December

> 31, 1977, and from year to year thereafter, unless either party shall give to the other party a notice . . . of a desire to change or terminate this Agreement.
>
> After receipt of such notice, the Agreement shall be opened up and the change or changes desired by either or both parties shall be considered.

Article XIV(A) provided:

> No Layoff—No employee, in any classification under the jurisdiction of the Association [the Machinists' Union], shall be laid off during the term of this Agreement.

On October 19, 1977, Charles E. Deignan, Business Representative of the Machinists, wrote the MBTA, stating "Notification is given that the undersigned hereby wishes to re-open the Agreement . . . ." On October 26, 1977, Robert R. Kiley, Chairman of the MBTA, wrote to Mr. Deignan that "the Authority hereby gives notice that it desires to make changes in the aforesaid Articles of Agreement, as amended." In the following months, the MBTA and the Machinists apparently negotiated, but they reached an impasse in July 1980. Though the Agreement also provided for interest arbitration, they could not agree, in light of Chapters 405 and 581, what form that arbitration should take.

Until March 2, 1981, the MBTA was prevented from making significant changes in the status quo by the state court injunction referred to at page 15 note 21, and page 41 *supra*. On March 3, 1981, however, the MBTA notified the Machinists that it intended to lay off fifty-three employees represented by that union, effective March 21, 1981.

The Machinists then intervened as a plaintiff in this action initiated by the Transit Union. The Machinists claimed protection under the 1974 § 13(c) agreement.[58] They joined the Transit Union in its Supremacy Clause and Contract Clause contentions. And they claimed that, in any event, as a matter of state law, their collective bargaining contract was still in effect and Article XIV of that contract prohibited layoffs.

The district court enjoined the layoff of the Machinists on the basis of state law. It reasoned that the Machinists' contract had, in fact, expired on December 31, 1977, and that the exchange of notices given in October 1977 had operated under the terms of the contract "to cut off the 'year to year' extended term." 511 F. Supp. at 316. However, because it appeared from an "uncontradicted affidavit" submitted by the Machinists that "the parties have treated the agreement as continuing in force up to this time, and have mutually enforced its terms as from time to time amended," 511 F. Supp. at 316-317, the district court ruled that "the MBTA is estopped to deny the continuation in force of the agreement dated January 1, 1976. . . ."

Id. at 317. The court further stated:

> The proposed layoffs of members of the Machinists' Union is in direct violation of the explicit terms of the collective bargaining agreement, and while they may be justified they are properly the subject of arbitration

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[58] The BMTA contends that while the International Association of Machinists and Aerospace Workers signed the : 13(c) agreement, it did so in its capacity as an organization representing Boston and Maine Railroad employees, not MBTA employees. (Affidavit of Paul J. Murphy, April 29, 1981). In November 1980, the attorney for the Machinists was informed of the MBTA's position that since Lodge 264 was not a signatory to the existing : 13(c) agreement, it could not invoke the protections of that agreement. This issue has not been briefed by any of the parties, and it is not necessary that we decide the matter here.

> under the existing agreement before they are effectuated. Such arbitration would not be interest arbitration subject to ch. 405 of the Act of 1978.

Id. at 320.

The MBTA appeals this ruling. It agrues that it was inappropriate for the district court to invoke the doctrine of equitable estoppel. *See Celluci* v. *Sun Oil Co.,* 2 Mass. App. Ct. 722, 320 N. E. 919, 923 *aff'd* 368 Mass. 811, 331 N. E. 2d 813 (1974). The Machinists disagree. They add that the district court, in any event, should have found that the collective bargaining agreement did not terminate in 1977, that it was only "opened" for changes, and that its terms therefore continue to apply.

We are reluctant to conclude that at the time of its ruling the district court abused its discretion in issuing a preliminary "layoff" injunction. *See Nat. Tank Truck Carriers, Inc.* v. *Burke,* 608 F. 2d 819, 823 (1st Cir. 1979). Yet, we note that the questions presented here are now entirely matters of state law. They are closely related to matters which have been, and may still be, subject to adjudication in the state courts. *See Gallahue* v. *MBTA, supra.* Moreover, the district court made its equitable estoppel ruling on the basis of what it described as an "uncontradicted affidavit" submitted by the Machinists that "the parties have treated the agreement as continuing in force. . . ." 511 F. Supp. at 316-317. In its brief and in various opposition papers, the MBTA appears to dispute this assumption, thus undercutting a premise fundamental to the district court's reasoning. Also, given our holding here, it now seems unlikely that the Machinists can pursue any related federal claim. In addition, the district court wrote on March 17 that the injunction delaying the layoffs pending grievance arbitration was to remain in effect only for a "reasonable time pending the prompt completion of arbitration." 511 F.

Supp. at 321. Under these circumstances, we believe it appropriate for the district court to reconsider the propriety of the injunction in light of present circumstances.

V

The decision to grant or deny preliminary injunctive relief ordinarily lies within the sound discretion of the trial court. *Grimard* v. *Carlston,* 567 F. 2d 1171, 1173 (1st Cir. 1979). We will not lightly overturn that judgment. *Maceira* v. *Pagan,* 649 F. 2d 8, 15 (1st Cir. 1981) (*see* cases cited therein). However, the "application of an improper legal standard" or the "misapplication of an improper legal standard" or the "misapplication of the law to particular facts" provides a basis for reversal. *Planned Parenthood League of Mass.* v. *Bellotti,* 641 F. 2d 1006, 1009 (1st Cir. 1981). We have found that Chapters 405 and 581 are constitutionally sound. For this reason, the Transit Union has failed to demonstrate likelihood of success on the merits, a prerequisite to the granting of preliminary injunctive relief. *Id.* at 1009.

Accordingly, to the extent that it is inconsistent with this opinion, the district court's order of March 17, 1981, as clarified on May 15, 1981, is vacated and the case is remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 81-1180

LOCAL DIVISCION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC,

Plaintiff, Appellant,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defandants, Appellees.

No. 81-1198

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, ET AL.,

Plaintiffs, Appellees,

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,

Defandants, Appellants.

No. 81-1219

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO,

Plaintiff, Appellee,

v.

THE COMMONWEALTH OF MASSACHUSETTS,

Defendant, Appellee.

MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Walter Jay Skinner, *U. S. District Judge*]
[511 F. Supp. 312 (D. Mass. 1981)]

Before
Coffin, *Chief Judge,*
Campbell, Bownes and Breyer,
Circuit Judges.

MEMORANDUM AND ORDER

Entered October 23, 1981

PER CURIAM. The plaintiff in these cases, the Transit Union, moves this court to reconsider its decision of September 30, 1981, to rehear this case *en banc,* and to grant an additional thirty days to file a further brief in support of its motions. The parties have had considerable opportunity to argue their position in this case. Initially, when ths court considered an application for a stay of the district court's order, the Transit Union filed a brief, a reply brief, and argued orally at hearing. Subsequently, with the court's permission, the Transit Union filed a 100-page brief and a reply brief on the merits; it again participated in oral argument. It has now filed an 11-page brief in support of its present motions. All of these briefs have involved, roughly speaking, the same issues which were considered thoroughly by this court in its September 30, 1981 opinion. We are therefore reluctant, given the demands of other cases, to grant extensions of time, and to invite further briefing.

Moreover, we do not believe that additional briefing is necessary given the arguments that the Transit Union now seeks to raise:

1. The Transit Union states that we did not address the question of whether the Massachusetts state laws violate the Contract Clause of the Constitution through conflict with the 1974 § 13(c) assurances that the Transit Union and the MBTA made to the Secretary of Labor; rather, our Contract Clause discussion focused upon the 1973 Basic Agreement between the Transit Union and the MBTA. It is true that the parties did not argue the "§ 13(c)/Contract Clause" issue as a separate matter before us. But, had they done so, the result would have been the same. We held that Congress intended that § 13(c) assurances be subject to specific state statutes to the contrary. Consequently, any § 13(c) agreement was made subject to possible state enactment of a conflicting statute. Hence, such a statute could not have impaired the obligations of the "contract" (if it was one).

2. The Transit Union argues that we ought not to have applied the standard of *Schwartz* v. *Texas,* 344 U.S. 199 (1952), requiring a clear showing of Congressional intent to preempt a field. Since we are dealing with the question of whether Congress intended a set of lengthy, detailed, specific assurances, presented to the Secretary of Labor by private parties to prevail over state law to the contrary, the *Schwartz* standard would seem appropriate. But even if it is not, the result would not change. Our review of the relevant legislative history, set out in the

opinion, makes clear that Congress did not intend the detailed, local assurances negotiated under § 13(c) to invalidate specific state laws to the contrary.

3. The Transit Union reiterates its view that our decision conflicts with the law in other circuits. We discussed the views of other circuits, including that of the Sixth Circuit and Eighth Circuit, in our opinion. We concluded that contrary views, for the most part, are expressed in dicta or alternative holdings. We found no other opinion that explored the issue in depth. None of the cases cited involves the type of conflict between state law and § 13(c) assurances present here, namely, state law that takes the form of a specific, clear state statute, directly and purposefully aimed at local transit problems (and an ambiguously worded § 13(c) agreement made several years before). We remain convinced that there is not yet any significant conflict on this issue among the circuits. But, in any event, for reasons previously set out, we have not followed the approach that the Transit Union believes the opinions that it cites suggest.

4. The Transit Union points to legislative history showing that § 13(c) was amended by Senator Morse and states that the amendment makes the difference. This court previously reviewed the entire legislative history of the stateute, including the Morse amendment. That amendment was directed at the *terms* of the § 13(c) assurance, not at the question of whether the assurance was designed to supersede state law. Indeed, as the opinion points out, Senator Morse himself subsequently states that the "state can continue its [conflicting] policy if it wishes to; but . . . the State should not be allowed to receive Federal money . . . ."

5. The Transit Union states that a rehearing *en banc* is required because we have modified a prior decision, *Local Division 714, Amalgamated Transit Union* v. *Greater Portland Transit District,* 589 F. 2d 1 (1st Cir. 1978). The "question of then to hold, or then not to hold, an *en banc* hearing is within the discretion of this court." *United States* v. *Martorano,* 620 F. 2d 912 (1st Cir. 1980); Fed. R. App. P. 35(a). As we pointed out, we have not overruled *Greater Portland. Greater Portland* holds that the federal courts have jurisdiction to enforce § 13(c) agreements. We stated that we would not follow language in that opinion insofar as it might be read to suggest that a § 13(c) assurance automatically prevails over conflicting state law. *Greater Portland* will still offer both jurisdiction and meaningful relief in other cases.

6. The Transit Union makes other arguments related to the enforceability of § 13(c) and potential conflict between state law and that statute. We have discussed these issues in the opinion, describing the discretion that Congress meant to confer upon the Secretary of Labor and concluding that the Secretary maintains authority to prevent violation of the statute.

This cursory review of the issues the Transit Union now raises is meant to suggest that, for the most part, its arguments are dealt with more thoroughly in our previous opinion and that its other arguments do not provide adequate reason for a rehearing or a rehearing *en banc.* Consequently, the motions for a rehearing, rehearing *en banc,* and for an extension of time to file a further brief are denied.

By the Court:

/s/ DANA H. GALLUP,
Clerk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIVISION 587, AMALGAMATED TRANSIT UNION, AFL-CIO,
Plaintiff-Respondent,

v.

MUNICIPALITY OF METROPOLITAN SEATTLE,
Defendant-Petitioner.

No. 80-3532
ORDER

BEFORE: WRIGHT, SCHROEDER, and ALARCON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing in this case.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Division 587, Amalgamated Transit Union, AFL-CIO,
Plaintiff-Respondent,
v.
Municipality of Metropolitan Seattle,
Defendant-Petitioner.

No. 80-3532
D.C. # CV 80-1227
OPINION

Appeal from the United States District Court
for the Western District of Washington

Walter T. McGovern, District Judge, Presiding
Argued and submitted August 4, 1981

Before: WRIGHT, SCHROEDER and ALARCON, Circuit Judges..

SCHROEDER, Circuit Judge:

The Municipality of Metropolitan Seattle ("Metro") appeals from a preliminary injunction ordering it to submit to interest arbitration of a new collective bargaining agreement pursuant to the terms of a contract required by § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601 *et seq.* Four other circuits have considered union applications to enforce parallel provisions of similar contracts; in all instances the union's position was sustained. *Local Division 1285, Amalgamated Transit Union, AFL-CIO* v. *Jacson Transit Auth.*, 650 F. 2d 1379 (6th Cir. 1981); *Division 1235, Amalgamated Transit Union, AFL-CIO* v. *Metropolitan Transit Auth.*, 650 F. 2d 1389 (6th Cir. 1981); *Local Division 714, Amalgamated Transit Union, AFL-CIO* v. *Greater Portland Transit Dist.*, 589 F. 2d 1 (1st Cir.

1978); *Local Division 519, Amalgamated Transit Union, AFL-CIO* v. *LaCrosse Municipal Transit Util.*, 585 F. 2d 1340 (7th Cir. 1978); *Division 1287, Amalgamated Transit Union, AFL-CIO* v. *Kansas City Area Transp. Auth.*, 582 F. 2d 444 (8th Cir. 1978). We do not depart from that pattern. Nor do we find that the district court abused its discretion in entering the injunction. We affirm.

Section 13(c) of the Act, 49 U.S.C. § 1609(c),[1] requires recipients of federal transit funds to make fair and equitable arrangements to protect the interests of their employees affected by such assistance. These arrangements take the form of agreements between the grant recipient and the union; the agreements must be approved by the United States Secretary of Labor as a condition of the receipt of federal funds. Metro and the appellee union have entered into a series of such § 13(c) agreements since 1972.

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[1] Section 13(c) reads in full:

> (c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Paragraph 15(a) of the 1980 § 13(c) agreement requires that the terms of a new collective bargaining agreement be submitted to binding arbitration ("interest arbitration") if a dispute has been unresolved for over thirty days.[2] The principal issues before us pertain not to the interpretation of that provision but to its enforceability.

The threshold issue in this case, as in the other federal cases involving § 13(c) agreements, is that of federal subject matter jurisdiction. The union argues that this is a case which "arises under" federal law within the meaning of 28 U.S.C. § 1331. Commentators on the issue of the proper scope of federal question jurisdiction seem agreed on only one proposition: no completely satisfactory analytical framework has yet been devised. See the discussion in 13 Wright, Miller & Cooper, Federal Practice and Procedure § 3562 (1975). In this circuit, at least, the favored formulation appears still to be that the case must arise "directly" under federal law, a standard drawn from Justice Cardozo's famous "compass," in *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 57 S. Ct. 96 (1936). *See, e.g., Town of Greenhorn* v. *Baker County*, 596 F. 2d 349, 351 & n.8, 353 (9th Cir. 1979); *Keaugaha-Panaewa Community Ass'n* v. *Hawaiian Homes*

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[2] Paragraph 15(a) provides in relevant part:

> In the case of any labor dispute involving the application, interpretation or enforcement of any of the provisions of this agreement . . . which cannot be settled by the parties within thirty (30) days, the same may be submitted at the written request of either party to a board of arbitration . . . The term "labor dispute" shall be broadly construed and shall include any controversy concerning . . . the making or maintaining of collective bargaining agreements, [and] the terms to be included in such agreements . . . .

Comm'n, 588 W. 2d 1216, 1225-26 (9th Cir. 1978); *League to Save Lake Tahoe* v. *B.J.K. Corp.*, 547 F. 2d 1072, 1074 (9th Cir. 1976). However, the likelihood of the invocation of this test has proved more certain than the result of its application. *See, e.g.*, Cohen, *The Broken Compass: The Requirement That a Case Arise "Directly" Under Federal Law*, 115 U. Pa. L. Rev. 890 (1967).

Metro's position is that this is simply a contract dispute which should be settled in state court. It stresses that a suit on an agreement between private parties does not raise a federal question merely because the agreement was authorized by federal law or because some federal agency approved the agreement. *See McFaddin Express, Inc.* v. *Adley Corp.*, 36 F. 2d 424 (2d Cir. 1965); *Chicago & Northwestern Ry.* v. *Toledo, Peoria & W. R.R.*, 324 F. 2d 936 (7th Cir. 1963). It also points out that the statute itself does not require that the agreements contain provisions for interest arbitration and it therefore urges that the matter cannot be said to "arise under" the laws of the United States within the meaning of § 1331.

Careful review of the authorities persuades us that much more is involved here than simple congressional authorization to contract coupled with governmental approval of contractual provisions. Congress in § 13(c) did not merely authorize agreements to preserve collective bargaining rights of employees. It required them. Congress further required that the Secretary of Labor determine what terms must be included, and Congress specified that the agreements would become part of the grant contract between the United States and the transit authority. In addition, it authorized the Secretary to enforce those contracts. 49 U.S.C. §§ 1602(f), (g); 1608(a); 12 U.S.C. § 1749a. The most extensive discussion of these matters is contained in *Greater Portland, supra,* 589 F. 2d at 5-8, in which the court concluded that violation of a § 13(c) agreement would amount to a violation of federal law. We agree with the First Circuit's statement that, by requiring labor agreements under § 13(c), "Congress implicitly mandated both compliance with those arrangements and a federal remedy for their breach." *Id.* at 7.

With respect to enforcement by private suit, it seems apparent that Congress, in requiring a contractual agreement as the vehicle for the protection of existing labor standards, intended these rights to be enforceable through private actions. Metro does not contend otherwise, nor does it suggest that the four-part test set forth in *Cort* v. *Ash,* 422 U.S. 66, 78, 95 S. Ct. 2080, 2088 (1975), is not met. Moreover, the legislative history of the statute confirms that it was intended to prevent employees from losing any rights that they may have enjoyed previously, including rights conferred by the National Labor Relations Act and enforceable in the federal courts. *Jackson Transit, supra,* 650 F. 2d at 1385. *See generally International Association of Machinists* v. *Central Airlines,* 372 U.S. 682, 83 S. Ct. 956 (1963). Again, we see no compelling reason to depart from the unanimous line of authority from other circuits that have considered this question.[3]

Apart from jurisdiction, the main argument presented by Metro is that the parties have agreed to be governed by state law and that state law does not permit Metro to agree to engage in interest arbitration.

Metro's contention that the parties have agreed to be governed by state law is based upon the wording of the severance provision of the § 13(c) agreement. The provision is designed to provide for continuity should any part of the agreement be declared invalid, and it states:

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[3] This issue is not entirely free from doubt and has caused one judge to dissent. *See Local Division 1285, Amalgamated Transit Union 1285, AFL-CIO* v. *Jackson Transit Authority,* 650 F. 2d 1379, 1388-89 (6th Cir. 1981) (Merritt, J., dissenting).

> In the event any provision of this agreement is held to be invalid, or otherwise unenforceable under the federal, State, or local law, in the context of a particular Project, the remaining provisions of this agreement shall not be affected and the invalid or unenforceable provision shall be renegotiated by Metro and the interested union representatives of the employees involved for purpose of adequate replacement under § 13(c) of the Act. If such negotiation shall not result in mutually satisfactory agreement, any party may invoke the jurisdiction of the Secretary of Labor to determine substitute fair and equitable employee protective arrangements for application only to the particular Project, which shall be incorporated in this agreement only as applied to that Project, and any other appropriate action, remedy, or relief.

This contingency provision is not a statement that the parties have agreed to be governed by state law in the event of a conflict between the provisions of the agreement and state law.

Nor do we agree with Metro that the arbitration provisions of the § 13(c) agreement conflict with Washington state law concerning powers of municipal corporations in the area of collective bargaining. Metro's argument is premised upon R.C.W. § 35.58.350, a general statute vesting the powers of a municipal corporation with respect to salaries, wages, and other compensation in the metropolitan council.[4] Metro concedes that these powers of municipal

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[4] Section 35.58.350 states that

> [a]ll the powers and functions of a metropolitan municipal corporation shall be vested in the metropolitan council unless

(Footnote continued on following page)

corporations are for the legislature to determine, *see Spokane* v. *Spokane Police Guild,* 87 Wash. 2d 457, 553, P. 2d 1316, 1320 (S. Ct. 1976), and that the legislature has greatly expanded the scope of collective bargaining and arbitration for public employees. It argues, however, that because there is no specific statute expressly permitting it to engage in interest arbitration as provided for in this § 13(c) agreement, Washington law prohibits enforcement of those provisions. While it is true that the legslature has not dealt specifically with every aspect of the Urban Mass Transportation Act, it has acted to harmonize Washington law generally with any requirement that Metro might have to meet to obtain funding under the Act. More specifically, the Washington legislature has provided that "[a]ny . . . metropolitan municipal corporation . . . shall have all powers necessary to comply with any criteria, standards, and regulations which may be adopted under the [UMTA] . . . and to take all actions necessary to meet the requirements of that act.'"[5]

Thus we need not reach the question recently decided by the First Circuit regarding the enforceability of interest

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(Footnote continued from preceding page)

> expressly vested in specific officers, boards, or commissions by this chapter. Without limitation of the foregoing authority, or of other powers given it by this chapter, the metropolitan council shall have the following powers:
>
> * * *
>
> (3) To fix the salaries, wages and other compensation of all officers and employees of the metropolitan municipal corporation unless the same shall be otherwise fixed in this chapter.

[5] Added by Laws, 1st Ex. Sess. 1975 ch. 270 § 8, effective July 1, 1975. See also R.C.W. § 35.58.180, empowering metropolitan municipal corporations to enter into contracts with the United States on such terms as may be argued upon by the contracting parties.

arbitration provisions in the face of newly enacted state law expressly limiting arbitration of wages in the transportation industry. *Local Division 589, Amalgamated Transit Union, AFL-CIO* v. *Massachusetts,* Slip op. Nos. 81-1180, 81-1198, 81-1219, September 30, 1981, *rehearing en banc denied,* October 23, 1981. In that case the Massachusetts legislature had earlier passed general enabling legislation quite similar to Washington's. Later, however, it enacted statutes specifying the scope of and procedures for arbitration involving the MBTA which conflicted with existing arbitration provisions of the § 13(c) agreement between the MBTA and the union. Acknowledging that other circuits have stated that the § 13(c) obligations are binding regardless of state law, *id.* at 39-40 *&* n.47, the First Circuit nevertheless concluded on the basis of an exhaustive review of the legislative history of the UMTA that "the specific detailed assurances given by a union and a transit authority to the Labor Department under (UMTA) § 13(c) do not invalidate a state law to the contrary." *Id.* at 40.

That is not our case. While we agree that the preemption question is a difficult one, we need not and do not address it in light of Metro's failure to establish that the threshold element, a conflict between state law and the § 13(c) agreement, is presented. The statutes we have referred to, R.C.W. 35.58.2794 and 35.58.180, confer on Metro a broad authority to take those steps necessary to qualify for federal financial assistance; having done so, Metro cannot now argue that it was barred from taking those necessary steps by a prior and more general statute.

Metro also contends that the entire § 13(c) agreement, including the provisions regarding collective bargaining and interest arbitration, applies only to those employees shown by the union to have been directly and adversely affected by the expenditure of federal funds. The overall purpose of § 13(c) of the Act was to protect the rights of transit employees, and the § 13(c) agreement between these parties contains a number of provision relating to individual grievances arising out of a federally funded project. There is no suggestion in this record, however, that there have been different collective bargaining agreements for employees directly affected by a federally funded project as opposed to those who are not. The language in the § 13(c) agreement upon which Metro relies is found in paragraph 15(b), requiring that in "any dispute as to whether or not a particular employee was affected by the Project," the employee must identify both the "Project" and the facts relied upon. We fail to see the relevance of that provision to collective bargaining negotiations. Indeed, paragraph 15(b) would seem to be inapplicable by its terms, as there has never been any dispute in this action "as to whether or not a particular employee was affected by the Project." The only plausible construction of paragraph 15(b) is that it relates to grievances of individual employees; it cannot be construed as a limitation on the collective bargaining provisions contained in paragraph 15(a).

We cannot quarrel with the district court's analysis of the balance of hardships involved in the issuance of an injunction requiring arbitration in order to avoid delay. *See LaCrosse, supra,* 585 F. 2d at 1350-51.

Affirmed.

No. 80-3203

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Division 1447, Amalgamated Transit Union, AFL-CIO,

Plaintiff-Appellee,

v.

Louisville and Jefferson County Transit Authority,
d/b/a Transit Authority of River City,

Defendant-Appellant.

ORDER Filed July 28, 1981

Before: WEICK, KEITH and JONES, Circuit Judges

Louisville and Jefferson County Transit Authority, d/b/a Transit Authority of River City (TARC) appeals from an order of the district court granting Division 1447, Amalgamated Transit Union, AFL-CIO's (the Union) motion for a preliminary injunction and ordering TARC and the Union to submit the disputed terms of a collective bargaining agreement to binding interest arbitration.

The Union is an unincorporated labor organization representing workers in the transit industry for the purpose of collective bargaining. TARC, through its management agent, operates the Louisville and Jefferson County transit system. TARC is the successor company to two private transit companies.

In 1974, TARC applied to the U. S. Government for a capital improvement grant under the UMTA of 1964, 49 U.S.C. §1601, *et seq.*, to assist TARC in the acquisition of privately-owned bus companies, the purchase of new transit coaches and the purchase of other equipment.

On February 26, 1974, TARC and the Union entered into an agreement as required by §13(c) of the UMTA (the §13(c) Agreement).

On February 5, 1976, the parties entered into the so-called "National §13(c) Agreement" which applies to operating assistance only, but which includes paragraph 11 in the addendum to the agreement.

The last collective bargaining agreement between the parties expired on August 31, 1979. Prior to August 31, TARC and the Union tried to negotiate a new labor agreement. It appears that the parties continued to bargain until November 6, 1979, when an impasse was reached over issues of wages, pensions, cost-of-living allowances, and part-time employees.

On December 4, 1979, the Union brought this action against TARC for a declaratory judgment, injuntive relief, damages and attorney fees with respect to TARC's refusal to proceed to arbitration of the disputed terms of a collective bargaining agreement in violation of the Urban Mass Transportation Act (UMTA) and the parties' agreements thereunder.

On February 29, 1980, the district court granted the preliminary injunction and ordered the parties "to submit to a Board of Arbitration selected in accordance with their Collective Bargaining Agreement." The district court concluded that it had subject matter jurisdiction under 28 U.S.C. §1331 and under the UMTA. Furthermore, the district court held that TARC's violation of the parties' section 13(c) Agreement implicitly violated section 13(c) itself. Finally, the district court decided that the Union is a beneficiary of the expired labor agreement and, as a consequence, will suffer irreparable injury unless the §13(c) Agreement is enforced.

On April 24, 1980, in recognition of an error it made, the district court issued an Order Clarifying Preliminary Injunction stating that the arbitration ordered "shall proceed according to the expressed terms of the 1974 Section 13(c) Agreement rather than as per the Collective Bargaining Agreement."

During the pendency of this case, this Court settled the conflict in this Circuit concerning the existence of subject matter jurisdiction and the propriety of interest arbitration. In *Local Div. 1285, Amalgamated Transit Union* v. *Jackson Transit Authority,* No. 78-1185 (6th Cir., filed June 3, 1981), in a similar action, we held *inter alia,* that federal courts have subject matter jurisdiction to entertain cases arising under section 13(c) agreements and the UMTA. On the same day, we also decided that a Union's claim based upon an alleged violation of its right to interest arbitration stated a cause of action under federal law for which relief can be granted in federal court. *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al.,* No. 79-1511 (6th Cir.). Consequently, the district court's finding of subject matter jurisdiction and order compelling collective bargaining on binding interest arbitration were proper. We believe that the district court's order granting preliminary injunction is appropriate.

Accordingly, the judgment of the district court is Affirmed and the case is Remanded for proceedings consistent herewith.

Entered by Order of the Court

/s/ John P. Hehman
Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 79-0629 L(A)

Division 1447, Amalgamated Transit Union, AFL-CIO,

Plaintiff,

v.

Louisville and Jefferson County Transit Authority,
d/b/a Transit Authority of River City and
ATE Management and Service Company,

Defendants.

PRELIMINARY INJUNCTION—Entered February 29, 1980

This action, having been submitted to the Court on the motion of the plaintiff for preliminary injunction, and the Court, having considered the evidence produced by the parties, the briefs and oral arguments, and being fully advised in the premises, and having entered its findings of fact, conclusions of law and memorandum opinion,

It Is Ordered and Adjudged that the plaintiff and the defendant, Louisville and Jefferson County Transit Authority, d/b/a Transit Authority of River City, submit to a Board of Arbitration selected in accordance with their Collective Bargaining Agreement which Board of Arbitration shall have the power to determine a just and equitable Collective Bargaining Agreement for the arbitrating parties.

It Is Further Ordered and Adjudged that the submission to an arbitartor or Board of Arbitration for its decision as to what shall constitute the new Collective Bargaining Agreement shall not constitute a bar to the right of the parties to continue to bargain with respect to the making of a new Collective Bargaining Agreement.

It Is Further Ordered and Adjudged that the parties shall initiate steps to set in process the arbitration procedures within 10 days after entry of this preliminary injunction.

It Is Further Ordered and Adjudged that the motion of the defendant, ATE Management and Service Company, to be dismissed from this action be and it is hereby reserved for further orders of this Court.

Dated 2/29/80

/s/ Carles M. Allen
Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 79-0629 L(A)

Division 1447, Amalgamated Transit Union, AFL-CIO,

Plaintiff,

v.

Louisville and Jefferson County Transit Authority,

d/b/a Transit Authority of River City and
ATE Management and Service Company,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION—

Entered February 29, 1980

This action is submitted to the Court on the motion of the plaintiff for a preliminary injunction, the Court having previously overruled the motion of defendants to dismiss this action. Jurisdiction of this action is vested in the Court by virtue of 28 U.S.C. Sec. 1331 and 49 U.S.C. Sec. 1601 et seq., as amended, which is known as the Urban Mass Transportation Act, hereinafter referred to as UMTA. See *Division 519, Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility,* 445 F. Supp. 798 (W.D. Wisc. 1977), aff'd. 585 F. 2d 1340 (7th Cir. 1978); *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transportation Authority,* 582 F. 2d 444 (8th Cir. 1978), cert.

denied ____ U.S. ____ (1979) 99 S. Ct. 872; *Division 714, Amalgamated Transit Union* v. *Greater Portland Transit District,* 589 F. 2d 6 (1st Cir. 1979).

It should be observed that nine other federal court decisions have already been rendered in this litigious field, and that there exists a split of authority on the question of jurisdiction, but this Court is convinced that the decisions cited above represent the sounder approach to a somewhat worrisome problem. It should also be observed that three district courts in the Sixth Circuit have already considered this question and that Judge Fran Wilson, in the case of *Division 1212, Amalgamated Transit Union* v. *Chattanooga Area Regional Transportation Authority,* No. CIV-1-79-212 (E.D. Tenn.) and Judge Thomas Wiseman, Jr., in the case of *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al.,* No. 79-3275 (M.D. Tenn.) have reached the same conclusion as has this Court, whereas District Judge Harry Welford of the Western District of Tennessee has reached an opposite conclusion in the case of *Local Division 1285, Amalgamated Transit Union* v. *Jackson Transit Union* v. *Jackson Transit Authority* [sic], 447 F. Supp. 88 (W.D. Tenn. 1977), which has been pending on appeal to the United States Court of Appeals for the Sixth Circuit since August, 1978.

Prior to 1974, transit service in Louisville and Jefferson County, Kentucky was provided by two private companies, the Louisville Transit Company and Blue Motor Coach Company. In 1974, the defendant Transit Authority of River City, known as TARC, was created under Kentucky law and applied for a federal grant under UMTA in order to purchase the two private companies and provide transit service.

In 1974 TARC entered into a Collective Bargaining Agreement with the plaintiff union, Paragraph 11 of which provided as follows:

> "In the event of any labor dispute involving the Public Body and the employees covered by this agreement which cannot be settled within thirty (30) days after such dispute first arises, such dispute may be submitted at the written request of either the Union or the Public Body to a board of arbitration selected in accordance with the existing collective bargaining agreement if any, or if none, as hereinafter provided. . . . The term 'labor dispute' shall be broadly construed and shall include, but not be limited to, any controversy concerning wages, salaries, hours, working conditions or benefits, including health and welfare, sick leave, insurance or pension and retirement provisions, the making or maintaining of collective bargainng agreements, any grievances that may arise, and any controversy arising out of or by virtue of any provisions of this agreement. Nothing in this paragraph, or agreement, shall be construed to enlarge or limit the right of the employees covered by this agreement, or their employer, to utilize upon expiration of any collective bargaining agreement or otherwise any economic measures that are not inconsistent or in conflict with the collective bargaining agreement or applicable law."

Prior to 1974, there had been no agreement between the union and the two private transit companies which provided for what is known as "interest arbitration." It is apparent from reading Paragraph 11 of the Collective Bargaining Agreement of 1974 that the parties contemplated that interest arbitration would be an integral part of their contract. At oral argument counsel for defendants contended that the last sentence of Paragraph 11, in effect, nullified the preceding sentences, in that it made the right of the parties to interest arbitration dependent upon state law and that Kentucky law prevented the defendants from entering into an interest arbitration agreement. That argument is without merit as may be seen upon a close reading of the last sentence.

Finally, in 1976 TARC agreed to what is known as the "National 13(c) Agreement" which applies to operating assistance only, but which includes Paragraph 11 in the Addendum to the National Agreement. The last collective bargaining agreement between the parties expired on August 31, 1979, the 1974 Agreement having been superseded by an Agreement entered into on September 25, 1977. Prior to August 30, 1979 and since that time, the parties have been negotiating concerning the making of a new collective bargaining agreement. As early as August 30, 1979 and again on September 12, 1979, the union demanded binding arbitration which would end in the making of a new collective bargaining agreement. These offers were refused, and defendants now contend that the demands made by the plaintiff-union have been so outrageous that the union is guilty of bad faith bargaining and, therefore, cannot come into this Court and demand equitable relief under the "clean hands" doctrine.

To resolve this question resort must be had to the express language of the contract between the parties. The Collective Bargaining Agreement refers to any labor dispute involving the parties which cannot be settled within 30 days after the dispute arises. The Agreement does nothing more than require a labor dispute and its existence for 30 days or more. It does not require bargaining in good faith but merely the existence of a labor dispute. The Court has examined other contracts between other transit unions and transit authorities and has found that some of them do require bargaining in good faith before arbitration can be required. Failure of defendants to insist upon such a provision in their Agreement is fatal to their defense of bad faith bargaining. They, like the plaintiff, are locked into the specific terms of their Agreement.

Defendants contend that the plaintiff has not stated a cause of action under UMTA and under Section 13(c) of that Act. Title 42 U.S.C. Sec. 1609(c), Sec. 13(c) of the Act provides as follows:

> "(c) It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwse; (2) the continuation of collective bargaining rights; and (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off, and (5) paid training or re-training programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

Defendants contend that it was the intent of UMTA and particularly Section 13(c), to protect employees against a worsening of their rights, and that since the employees had no interest arbitration in their Collective Bargaining Agreements with the private transit companies, that they are not entitled to use this provision of the Collective Bargaining Agreement to bring into play the jurisdiction of federal courts and their injunctive powers to enforce such an Agreement. The answer to that contention was ably discussed by District Judge Wiseman in the case of *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al, supra.* This Court adopts the reasoning of Judge Wiseman by reference.

The defendants also contend that plaintiff is not entitled to a preliminary injunction because plaintiff is seeking monetary relief. While that argument has considerable theoretical appeal, it does not persuade the Court, especially in view of the fact that the parties have had an opportunity to fully develop by depositions and discovery the factual background of this dispute. Furthermore, in *Division 519 Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility, supra,* the Seventh Circuit upheld Judge Doyle in his granting of a preliminary injunction to the union requiring interest arbitration.

As stated by District Judge Wiseman, defendants have violated their Section 13(c) Agreements, and in so doing, they have implicitedly [sic] violated Section 13(c) itself. As Judge Wiseman also stated, that decision is contrary to the decision in *Division 580, Amalgamated Transit Union, AFL-CIO* v. *Central New York Regional Transportation Authority,* 556 F. 2d 659 (2nd Cir. 1977). Examination of these two decisions and of the other decisions, both pro and con, convince this Court that the reasoning of Judge Wiseman is more persuasive and should be followed.

While defendants would like to have this case interpreted as being between private parties and subject only to Kentucky law, the Seventh Circuit Court in *LaCrosse, supra,* used the following applicable language in rejecting such a contention:

> "Because Sec. 13(c) mandates a 'fair and equitable arrangement' that meets the approval of the Secretary

> of Labor, *the exact and concrete terms of an arrangement define the more general requirements of the statutory provision.* The approval of the Secretary stamps the 13(c) agreement as something more than a mere private contract formulated under the aegis of a federal statute. Instead, the contract is infused with statutory prerequisites. Clearly, then, the terms written into a 13(c) agreement are grounded in federal law." 585 F. 2d, at 1346 (emphasis added).

The Court observes that the members of the plaintiff-union are working for the same wages and under the same conditions now as they were almost five months ago when the Collective Bargaining Agreement expired. It is apparent that there is a need for resolution of this labor dispute and that that need at the present apparently can only be met by interest arbitration. It is apparent also that the members of plaintiff-union are beneficiaries of the Collective Bargaining Agreement and will suffer irreparable injuries unless the 13(c) Agreement is enforced. See *Division 519 Amalgamated Transit Union* v. *LaCrosse Municipal Transit Utility, supra,* and *Division 1235, Amalgamated Transit Union* v. *Metropolitan Transit Authority, et al, supra.*

It is also apparent that plaintiff's chances of success on the merits are great and that the public interest will be served by the activation of the arbitration machinery, laborious though it may be. Of course, the parties still retain the right to settle their dispute at any time prior to the final resolution of their dispute by arbitration.

An order in conformity with this opinion has been entered this day.

Dated 2/29/80

/s/ Charles M. Allen
Chief Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C-0629-L(A)

Division 1447, Amalgamated Transit Union, AFL-CIO,

Plaintiff,

v.

Louisville and Jefferson County Transit Authority,
d/b/a Transit Authority of River City and
ATE Management and Service Company,

Defendants.

ORDER CLARIFYING PRELIMINARY INJUNCTION—Entered April 24, 1980

This matter, having been submitted to the Court on motion of the Plaintiff to clarify the preliminary injunction which was issued by this Court on February 29, 1980, said motion being supported by appropriate memoranda, and the Defendants having responded thereto, and the Court being duly and sufficiently advised,

It Is Hereby Ordered and Adjudged That this Court's preliminary injunction which was issued on February 29, 1980 is hereby clarified to state that the arbitration proceeding that this Court ordered shall proceed according to the expressed terms of the 1974 Section 13(c) Agreement, rather than as per the Collective Bargaining Agreement.

/s/ Charles M. Allen
United States District Judge

Date 4/24/80

Opposition

1

Supreme Court, U.S.
FILED
APR 22 1982
ALEXANDER L. STEVAS
CLERK

NO. 81-1817

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

LOCAL DIVISION 589, AMALGAMATED TRANSIT UNION, AFL-CIO, CLC
AND
BOSTON LODGE 264, DISTRICT 38, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,
Petitioners,

V.

THE COMMONWEALTH OF MASSACHUSETTS
AND
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE FIRST CIRCUIT BEFORE JUDGMENT

RESPONDENT COMMONWEALTH OF MASSACHUSETTS' BRIEF IN OPPOSITION

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I. QUESTIONS PRESENTED

1. Whether recent Massachusetts statutes which regulate labor arbitration procedures at the Massachusetts Bay Transportation Authority cause such actual and significant frustration of the federal policy expressed in Section 13(c) of the Urban Mass Transportation Act that the statutes should be held invalid under the Supremacy Clause of the United States Constitution.

2. Whether the Contract Clause of the United States Constitution bars the Commonwealth of Massachusetts, in the context of a mass transit emergency, from modifying the arbitration process used to create future labor contracts at the M.B.T.A., in order to insure that future contracts give management the authority necessary to eliminate inefficient work practices.

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II. OPINION BELOW

The Commonwealth adopts the statement in the Union's Petition for Certiorari, but notes that the opinion of the Court of Appeals, printed in the Appendix at D1, is now reported at 666 F. 2d 618 (1st Cir. 1981).

III. JURISDICTION

The issue of jurisdiction was not litigated in the lower courts because the First Circuit had previously held that a private right of action and federal question jurisdiction existed under Section 13(c) of U.M.T.A. Local Division 714, A.T.U., A.F.L.-C.I.O. v. Greater Portland Transit District, 589 F. 2d 1 (1st Cir. 1978).

The Commonwealth questions whether federal jurisdiction exists in this case, for the reasons set forth in the brief of the Jackson Transit Authority in Case No. 81-411.

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Commonwealth adopts the statement in the Union's Petition for Certiorari.

V. STATEMENT OF THE CASE

A. Nature of the Controversy

This is a petition for a writ of certiorari, requesting review of a unanimous, interlocutory decision of the First Circuit Court of Appeals. The Circuit Court decision reviewed the constitutionality of two Massachusetts statutes which reform labor arbitration procedures and expand management rights at the Massachusetts Bay Transportation Authority ("M.B.T.A."). See 1978 Mass. Acts and Resolves, c. 405; 1980 Mass. Acts and Resolves, c. 581. (App. A21-A44). The petitioner, Local Division

589, Amalgamated Transit Union,[1/] ("Union") has challenged the statutes in question, arguing that they violate the Supremacy and Contract Clauses of the United States Constitution. The Court of Appeals has decided an interlocutory appeal, upholding the constitutionality of the statutes, vacating preliminary injunctions entered by the District Court, and remanding the case for further proceedings. Local Division 589, A.T.U., A.F.L.-C.I.O., v. Commonwealth of Massachusetts, 666 F. 2d 618 (1st Cir. 1981) (App. D1) (henceforth referred to as "M.B.T.A.

[1/] Local Division 589 has been joined in this Petition by Lodge 264, International Association of Machinists. The lower courts have addressed the issues in this litigation almost exclusively in terms of the facts and agreements involving Local 589, and this brief will do so as well.

Opinion"). The First Circuit later issued a per curiam opinion denying the Union's Motion for Rehearing and denying the Union's application for a stay of mandate. Id. at 645-47 (App. E1-E5). The case is presently before the District Court. No final judgment has been entered.

B. Summary of Facts and Prior Proceedings

This dispute arose in 1978, when the Massachusetts Legislature passed a statute (known as "Chapter 405") which specified for the first time the qualifications required of arbitrators performing interest arbitration for M.B.T.A. employees. Chapter 405 also changed the number of arbitrators and required the arbitrator to consider certain specified criteria in framing an award. Id. at 622-23 (App. D7-D9).

The Union objected to Chapter 405, arguing that it conflicted with the arbitration procedure specified in its past collective bargaining agreements with the M.B.T.A. The Union stated that the arbitration provisions of those agreements continued in force indefinitely into the future, and acted as a perpetual bar to any effort by the Commonwealth to regulate labor arbitration at the M.B.T.A. _Id_. at 637-38 (App. D44-D46).

The Union also argued that Chapter 405 conflicted with assurances which the M.B.T.A. had given to the U.S. Department of Labor in connection with federal funding applications under "Section 13(c)" of the Urban Mass Transportation Act, 49 U.S.C. §1609(c) ("U.M.T.A."). _Id_. at 621 (App. D5). These Section 13(c) assurances contain no fixed expiration date (see, e.g., App. A46-A65), and it is the Union's position that the Section 13(c) assurances, like its collective bargaining agreement, are a near-perpetual bar to Massachusetts' attempts to regulate its transit labor force. Id. at 633-34 (App. D33-D36).

In 1979, the Union filed this lawsuit, alleging that Chapter 405 violated the Contract and Supremacy Clauses of the United States Constitution. A new union contract was later signed, and Chapter 405 was never implemented.

By 1980, the M.B.T.A. was in serious financial difficulty. See Cohen v. M.B.T.A., 647 F. 2d 209, 214 (1st Cir. 1981). On December 6, 1980, the system shut down entirely for lack of funds, "[threatening] the availability of essential services of transportation to such an extent as to endanger the health, safety and welfare of the community." M.B.T.A. Advisory Board v. M.B.T.A., Mass. Adv. Sh. (1981) 403, 407, quoted in M.B.T.A. Opinion at 641 (App. D52-53).

On December 7, 1980, the Massachusetts Legislature enacted legislation (known as "Chapter 581") to re-establish mass transit service in Boston, and to reform the inefficient management and labor practices which had led the M.B.T.A. into financial crisis.2/ Chapter 581 confirmed management's exclusive rights

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2/ The legislative facts on which the lawmakers relied were set forth in affidavits filed with the District Court and were referred to in the Circuit Court's opinion at 642-643 (App. D54-D57); they include the existence of rampant "featherbedding" in M.B.T.A. operations, wages which are almost double those of non-M.B.T.A. employees in Massachusetts doing comparable work, and restrictive work rules which make the Authority's per-mile cost of operation the highest in the country.

to hire, promote, assign and discharge employees, to assign overtime, and to exercise other specified powers necessary to effective and efficient operation, and removed those rights from the scope of future bargaining and arbitration. Id. at 623 (App. D10).[3] In February, 1981, the Union moved to amend the complaint in this case to attack the constitutionality of Chapter 581 on essentially the same grounds as were asserted against Chapter 405.

In orders issued on March 17 and May 15, 1981, the U.S. District Court ordered the Union and the M.B.T.A. into a "hybrid" form of interest arbitration, incorporating portions of Chapter 405 but none of Chapter 581. Local Division 589, A.T.U., A.F.L.-C.I.O. v. Commonwealth of Massachusetts, 511 F. Supp. 312 (D. Mass. 1981). (See App. A1-A21 and B1-B5).

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[3] Chapter 581 also contained provisions reforming the management and political governing structure of the M.B.T.A. Those provisions have not been challenged by the Union.

All parties appealed the District Court's orders to the First Circuit Court of Appeals, which agreed to hear the interlocutory appeal on an expedited basis. On September 30, 1981, the Court of Appeals issued a lengthy and unanimous decision which carefully analyzed all aspects of the controversy and upheld both Massachusetts statutes in their entirety. On October 23, 1981, the Court of Appeals unanimously denied the Union's request for rehearing en banc in a per curiam opinion joined in by the Chief Justice. Later, the Court denied the Union's application for a stay.

The Union now asks this Court to review and reverse the unanimous, interlocutory decisions of the First Circuit Court of Appeals.

VI. Argument

The petition for certiorari should be denied by this Court for the following reasons.

1. The decision of the Court of Appeals in this case is correct.

2. The decision of the First Circuit does not conflict with decisions of another circuit or of this Court.

3. The factual circumstances of the M.B.T.A. case are unique and constitute an alternate basis for affirmance.

A. The Decision of the Court of Appeals in this Case is Correct.

The Circuit Court addressed two questions in its opinion. They were presented as follows:

> First, can the Commonwealth of Massachusetts enact statutes that are inconsistent with assurances that its Transit Authority previously gave the Secretary of Labor as part of an application for federal grant money? Second, do those Massachusetts statutes unconstitutionally impair pre-existing collective bargaining contracts? Id. at 620 (App. D2).

1. The Supremacy Clause Issue.

The first of the two questions concerns the validity of Chapters 405 and 581 under the Supremacy Clause of the U.S. Constitution. The Transit Union has suggested that the Circuit Court was primarily, and wrongly, concerned with "whether Congress intended to occupy the whole field of collective bargaining" by U.M.T.A. recipients. Petition for Certiorari at 15. In fact, the Court of Appeals viewed the Supremacy Clause issue in a different, and narrower, light:

> The issue here. . . is whether Congress intended §13(c), or, to be

> more specific whether it intended assurances made pursuant to §13(c), to override conflicting state law. If not, state law governs - although the federal statutory scheme may provide other remedies for violation of an assurance. Id. at 627 (App. D20).

In posing the issue in this manner, the Circuit Court followed the principles set forth by this Court in Schwartz v. Texas, 344 U.S. 199, 202-203 (1952). The Circuit Court also recognized that where private agreements adopted under the aegis of a federal statute conflict with important state legislation,

> the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding one completely ousted'. . . [C]onflicting law, absent repealing or exclusivity provisions, should be pre-empted. . .'only to the extent necessary to protect the achievement of the aims of the [federal statute].' Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. 117, 127 (1973).

This course was even more appropriate because the Union has claimed in this case that Section 13(c) assurances are near-perpetual and bar the Commonwealth from regulating labor practices at the M.B.T.A. for the indefinite future. M.B.T.A. Opinion at 633 (App. D34).

Finding the language of the statute silent on the question of congressional intent (Id. at 627; App. D20), the Circuit Court carefully and exhaustively reviewed the legislative history and purposes of Section 13(c). Id. at 628-635 (App. D21-D37). It concluded as follows:

> Our examination convinces us that Congress intended state law, not §13(c) assurances, to prevail in case of a conflict. We base this conclusion upon express language contained in the legislative history upon the fact that a contrary holding risks distorting U.M.T.A.'s basic purposes, and upon the practical difficulties that would accompany a contrary result. Id. at 627-28 (App. D21).

In so concluding, the First Circuit did not rule that Section 13(c) protections are meaningless, as the Union now argues (Petition for Certiorari at 13); rather the Court found, and set forth in its opinion, overwhelming evidence that Congress meant Section 13(c) to be enforced by federal officials, through their power to grant or deny federal U.M.T.A. funds, rather than by judicial orders invalidating local public employee labor laws. M.B.T.A. Opinion at 634-35 (App. D37).

In requesting certiorari on this point, the Transit Union has asserted generally that the Circuit Court's review of the legislative history of Section 13(c) is wrong, but has identified no specific errors in it. The Commonwealth submits that this Court should not grant certiorari merely on the possibility that the Union will specifically identify an error in a future brief.

It should also be stressed that the Circuit Court's reading of Section 13(c) leads to a workable balance between state and federal policies, while the Union's interpretation would lead to severe difficulties in the administration of U.M.T.A. and in local transit relations. The Court of Appeals commented that: "[If] as the Transit Union contends, §13(c) assurances override state law, Congress, in enacting §13(c), to a significant extent federalized collective bargaining with local transit unions." _Id_. at 633 (App. D34). As a result, if the Union's view prevails the federal courts will become the forum of first resort for every local transit labor dispute, however minor.[4] This Court should not disturb the First Circuit decision without a clear indication of error and evidence that the union's theory would lead to a workable result.

2. The Contract Clause Issue.

The First Circuit noted in its decision that a Contract Clause issue might no longer exist in this case because "the Basic Agreement may well have expired before Chapters 405 and 581 took effect." Id. at 636 (App. D41).

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[4] For example, in April, 1981, shortly after the District Court partially struck down the Massachusetts statutes at issue here, Petitioner Lodge 264 moved for a federal injunction compelling arbitration over a cost-of-living payment dispute with the M.B.T.A. Lodge 264 argued that a violation of any term of its labor contract was a violation of its Section 13(c) assurances, and thus of Section 13(c) itself. See App. to Amicus Brief of M.B.T.A. in Local Division 1285, A.T.U., A.F.L.-C.I.O., C.L.C. v. Jackson Transit Authority, 650 F. 2d 1379 (6th Cir. 1981), *cert. granted* 50 U.S.L.W. 3347 (No. 81-411), at 96a-98a (hereinafter "Jackson").

The Court based this conclusion in part on a decision of the Massachusetts Superior Court, which had ruled preliminarily that the term of Local 589's last contract with the M.B.T.A. expired on December 31, 1980, and that even the "carryover" provisions of that contract (which are the only terms alleged to have been impaired in this case) had expired by July 1, 1981. (Id. at 636-37 (App. D41-D42).

Certainly there can be no Contract Clause violation if there is no longer a contract, See Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827), and the issue of whether a contract exists is one of state, not federal, law. It follows that there is, at present, no Contract

Clause dispute for this Court to address.[5]

The Union now seeks certiorari to secure review of an issue which would arise if, at some point in the future, the Massachusetts state court reversed its earlier ruling and held that a contract does exist between the parties.

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[5] The Union has separately argued that the Circuit Court should have viewed the Section 13(c) assurances as contracts, as well as federal statutes, and undertaken a separate Contract Clause analysis of the effect of the Massachusetts statutes on the assurances. Petition for Certiorari at 17.

The difficulty with this argument is that the relevant part of the Section 13(c) assurances does not require any particular form of arbitration; it merely incorporates by reference the terms of the "existing collective bargaining agreement." M.B.T.A. Opinion at 627 (App. D19-D20). Unless there is a bargaining agreement in existence, therefore, the Section 13(c) assurances do not specify a particular form of interest arbitration, and no conflict exists between the assurances and state law. See also, on this point, the per curiam Order denying the Union's motion for reconsideration. Id. at 646 (App. E3).

As the First Circuit put it, after ruling that the Union's contract had expired:

> Nonetheless, it is conceivable that state courts reviewing the Basic Agreement in related cases will reach a different conclusion. . . In that case, the narrow question before us is whether two subsequently enacted state laws (Chapters 405 and 581) can constitutionally override those provisions of the contract that provide for indefinite (or perpetual) extension (or renewal) of the contract's terms. We believe that they can. M.B.T.A. Opinion at 638 (App. D46).

The Commonwealth submits that the First Circuit's analysis of the impairment issue, on the assumption that there still is an existing contract between the parties, is correct.[6] More to the point, however, this Court should not grant certiorari either to second guess the state court's interpretation of the termination date of the Union's bargaining agreement or to decide the federal issues which might arise if the state court's ruling were otherwise.

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[6] The Circuit Court's analysis appears at pages 638-43 of its opinion (App. D46-D57).

B. There is No Significant Conflict Between the Circuits.

The Transit Union's primary argument for certiorari is that the First Circuit decision conflicts with prior rulings of the Sixth and Eighth Circuits. Petition for Certiorari at 14. See Division 1287, A.T.U., A.F.L.-C.I.O., C.L.C. v. Kansas City Area Transit Authority, 582 F.2d 444 (8th Cir. 1978), cert. denied 439 U.S. 1090 (1979) and Division 1447, A.T.U., A.F.L.-C.I.O., C.L.C. v. Louisville and Jefferson Transit Authority, 659 F. 2d 722 (6th Cir. 1981), petn. for cert. filed, 50 U.S.L.W. 3376 (No. 81-804) (hereinafter "Kansas City" and "Louisville").

The First Circuit responded to this argument in its opinion. It found some conflict with dicta in these decisions but not with their holdings. As the Court noted,

> [I]n none of these cases did the court explicitly explore the problem of a conflict with a state law, and in none did the court decide whether, as a matter of general principle, assurances provided under §13(c) govern in the face of a conflicting state statute. M.B.T.A. Opinion at 635 (App. D39.)

In particular, the Eighth Circuit's very brief discussion of the federal/state conflict in the Kansas City case did not specify the basis for the alleged state policy, review the legislative history of Section 13(c), cite any Supremacy Clause decisions, or make any effort to harmonize the state and federal systems. See Kansas City, 582 F.2d at 452-53. Cf. Merrill, Lynch, Pierce, Fenner and Smith, Inc. v. Ware, 414 U.S. at 125-140.

The analysis of federal/state conflicts in the Sixth Circuit's Louisville decision is simply non-existent. In fact, the Court's opinion does not mention the issue. See Louisville, supra.[7]

There are reasons why the First Circuit carefully analyzed the claim of federal/state conflict while other Circuit Courts have given it little or no attention. Those reasons are based in the complex facts of the case at bar, which are unique to this Section 13(c) litigation.

In Kansas City, Louisville, and almost every other reported Section 13(c) case, transit management had flatly

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7/ The transit authority's claim of federal/state conflict was discussed by the District Court in the Louisville case. However, that issue has not been discussed or analyzed by the Sixth Circuit, either in the Louisville case or in its earlier decision in the Jackson case.

refused to arbitrate with its unionized employees, despite a clear agreement to do so and without any showing of changed circumstances. In the case at bar, by contrast, both parties were consistently willing to arbitrate; the present dispute arose because the Massachusetts Legislature had enacted legislation which specified for the first time the scope, procedure and standards for the arbitration process.

Moreover, as will be more fully discussed in the final portion of this opposition, both the Sixth and Eighth Circuit cases involved precisely the type of situation which Section 13(c) was enacted to address: a public authority's use of U.M.T.A. funds to take over a private transit company, which resulted in workers losing the protection of federal labor laws. The holdings of both Circuit Courts were premised on this fact. See Kansas City, 582 F. 2d at 452-53; Jackson, 650 F. 2d at 1382, 1385, 1386.

In contrast, as described below, the case at bar involves no such "public takeover"; as a result, the policies of Section 13(c) do not apply to this controversy.

Finally, the First Circuit emphasized that:

> The record reveals the seriousness of the problems facing the M.B.T.A. and the alternatives tried. We are aware, as the Supreme Judicial Court has pointed out, that the financial crises which beset the M.B.T.A. in late 1980 "threatened the availability of essential services of transportation to such an extent as to endanger the health, safety and welfare of the community." M.B.T.A. Opinion at 641 (App. D52-D53).

Each of these factors led the First Circuit to give careful consideration to the interests of the state, see Merrill, Lynch, Pierce, Fenner and Smith, Inc., v. Ware, 414 U.S. at 127, and to analyze the Supremacy Clause issue with a depth not found in the opinion of any other court. The conflicting language in the opinions of other circuits does not pose a conflict significant enough to merit review by this Court.

C. The Factual Circumstances of the M.B.T.A. are Unique and Constitute an Alternate Basis for Affirmance.

The history of the M.B.T.A. differs from that of virtually all other American transit systems in one important factual respect, which both distinguishes the decision in this case from those in other circuits and suggests that if this Court granted certiorari it would be led to affirm the First Circuit on an alternate, and unique, ground: that Section 13(c) of U.M.T.A. does not apply to the arbitration and bargaining rights of M.B.T.A. employees.

In each of the Section 13(c) decisions cited by the Union, local governments had applied for and used U.M.T.A. grants to buy out failing private transit companies and convert them to public ownership. As a result, their employees lost the protection of collective bargaining rights provided by the National Labor Relations Act. See 29 U.S.C. §152(2).

Section 13(c) of U.M.T.A. was enacted primarily to respond to this problem,[8] a fact which was emphasized by each of the Circuit Courts in their decisions:

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[8] Section 13(c) was also designed to protect transit workers from job loss caused by U.M.T.A.-financed automation. M.B.T.A. Opinion at 628 (App. D22-D23). This aspect of Section 13(c) is not at issue in this litigation.

> The Act authorizes grants or loans of federal funds to state or local public authorities to enable them to acquire private transit companies. Employees of those companies will presumably become employees of the public agencies, and when it passed the Act Congress was concerned with the economic risks that such employees might incur as a result of the take-overs. Those risks might include loss of collective bargaining rights, loss of the right to strike, and loss of pension and retirement benefits. Section 13(c) of the Act is designed to protect, at least in large measure, the rights and interests of such employees from such risks.

Kansas City, 582 F.2d at 447, 452-53. See, to the same effect, H. Rep. No. 204, 88th Cong., 2d Sess. 4, _reprinted in_ 1964 U.S. Code Cong. & Ad. News 2583-84; _M.B.T.A. Opinion_ at 628 (App. D22); _Jackson_, 650 F. 2d at 1385; _Div. 580 A.T.U., A.F.L.-C.I.O., C.L.C. v. Central N.Y. Reg. Transp. Authy._, 578 F.2d 29, 30 (2nd Cir. 1978).

Indeed Section 13(c), by its express terms, authorizes the Secretary of Labor to demand assurances only "to protect the interests of employees affected by such assistance." (emphasis supplied) 49 U.S.C. §1609(c).

In contrast to the factual circumstances of every other reported case, all of which involved "public takeovers," the M.B.T.A. has been a public entity and its workers have been public employees since 1947. M.B.T.A. Opinion at 620 (App. D3). The receipt of U.M.T.A. funding after 1964 did not cause any change in the status of the Authority's employees or affect their labor rights in any way, a fact which the Union conceded in the District Court. For this reason, M.B.T.A. workers have not been "affected by" U.M.T.A. assistance within the meaning of Section 13(c), and its bargaining protections do not apply to them.

The First Circuit took note of the unique situation of M.B.T.A. workers and the limited purpose of Section 13(c) (id. at 620, n.1, and 634; App. D3, n.1, and D36), but did not treat these points as dispositive. Instead, it undertook the careful Supremacy Clause analysis discussed above. Even if its constitutional analysis were wrong, however, the First Circuit's decision of the Section 13(c) issue in this case could be upheld purely on this factual point which, to the Commonwealth's knowledge, is unique to the M.B.T.A. Such an affirmance would have no precedential value for other regions of the country.

VII. CONCLUSION

For the reasons set forth above, a writ of certiorari should be denied.

Respectfully submitted,

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No. 81-1817.

In the Supreme Court of the United States.

October Term, 1981.

LOCAL DIVISION 589, AMALGAMATED
TRANSIT UNION, AFL-CIO, CLC, AND
BOSTON LODGE 264, DISTRICT 38,
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
Petitioners,

v.

THE COMMONWEALTH OF MASSACHUSETTS and
THE MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the First Circuit.

Brief of Respondent Massachusetts Bay Transportation Authority in Opposition.

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Question Presented.

The Massachusetts Bay Transportation Authority disagrees with the petitioners' version of questions presented and respectfully submits that the following is the only question presented for review:

Whether § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c), ("UMTA") and ("§ 13(c)"), forbids a state from amending its labor relations laws governing local public transit employees as of the date a so-called § 13(c) agreement is first entered into between those employees and a local public transit authority.

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No. 81-1817.

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

LOCAL DIVISION 589, AMALGAMATED
TRANSIT UNION, AFL-CIO, CLC, AND
BOSTON LODGE 264, DISTRICT 38,
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS,
PETITIONERS,

v.

THE COMMONWEALTH OF MASSACHUSETTS AND
THE MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY,
RESPONDENTS.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the First Circuit.

Brief of Respondent Massachusetts Bay Transportation Authority in Opposition.

Preliminary Statement.

The respondent, Massachusetts Bay Transportation Authority respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion, reported at 666 F.2d 618 (1st Cir. 1981).

Statement of the Case.

I. *Facts Regarding the Transit Union.*

The Massachusetts Bay Transportation Authority ("MBTA") agrees substantially with facts regarding Local Division 589, Amalgamated Transit Union, AFL-CIO-CLC ("the Transit Union") as set forth in the petition. However, the MBTA disagrees with the following statements:

1. On page 6 of the petition, the Transit Union states, "the MBTA recommitted to the 1974 § 13(c) Agreement on the occasion of each of many federal grants received since that time. . ." The MBTA says that its action should be denoted "republishing the 1974 § 13(c) Agreement."

2. On page 6 of the petition, the Transit Union alleges that the § 13(c) agreement provides that "there shall be arbitration of labor disputes including disputes over the terms to be included in a collective bargaining (commonly known as "interest" arbitration). The procedures for arbitration are to be taken from any then applicable collective bargaining agreement. . ." The § 13(c) agreement (Pet. App. A46-A65), actually provides for arbitration of a dispute or controversy arising out of the interpretation, application or operation of the § 13(c) agreement and that the arbitrator "shall have no authority whatsoever to alter, amend, or modify any of the provisions of an existing collective bargaining agreement." (Pet. App. A60.)

3. On page 6 of the petition, the Transit Union alleges that the § 13(c) agreement provides that "Any extant right to bargain including the right to arbitrate labor disputes, will be preserved and continued." The Transit Union has omitted the critical qualification of the preservation of such collective bargaining rights, namely, that they shall be subject to applicable law. (Pet. App. A48.)

4. On page 8 of the petition, in discussing the Fallon arbitration award, dated August 13, 1979 (Res. App. 1a-35a) the Transit Union contends that the arbitrator "rejected at the outset the MBTA contention that language in the § 13(c) Agreements themselves meant that the federal § 13(c) protections were subordinate to everchanging doctrines of state law. . ." The Transit Union fails to say that the arbitrator relied on language not contained in the parties' December 10, 1974 § 13(c) agreement. *Compare* Fallon Arbitration Award (Res. App. 28a-29a) to § 13(c) agreement. (Pet. App. A48.)

5. On page 8 of the petition, the Transit Union alleges that, following the Fallon arbitration award, it filed this action to compel compliance with the award. However, prior to that action, the MBTA filed an action in the Supreme Judicial Court of Massachusetts (Res. App. 42a-47a) seeking, *inter alia*, to vacate the award. The Transit Union answered the complaint and filed a petition for removal of the MBTA's state court action to the federal court. The petition was denied on December 24, 1980 (Res. App. 36a-41a).

6. On page 8, the Transit Union alleges that the arbitrator resolved the dispute over whether the § 13(c) agreements by their terms subordinated employee rights to everchanging doctrines of state law. The arbitrator did not resolve the dispute since his decision was not accepted by the MBTA, which, as noted above, immediately filed suit in the Supreme Judicial Court of Massachusetts to vacate that award. (Res. App. 42a-47a.)

7. On page 8, the Transit Union alleges that ". . . the Department of Labor demanded that, as a condition of receipt of federal funds, the MBTA must abide by the § 13(c) Agreement protections, as thus interpreted." The Department of Labor demanded that the MBTA abide by the Fallon arbitration award (Res. App. 1a-35a) as a condition for its certification that fair and equitable arrangements were made to protect the

interests of employees affected by federal loans or grants. However, the Department of Labor at no time sanctioned the Fallon arbitration award or took a position on the correctness of the arbitrator's contentions. Further, in every federal grant contract executed since the date of the Fallon arbitration award, the MBTA attached a rider reserving its rights under the litigation which challenged the Fallon arbitration award.

8. On page 9, the Transit Union states that "[t]he MBTA then revealed that it did not intend to abide by its representations to the Labor Department and would not bargain or arbitrate except under the extremely restrictive terms of the Massachusetts statutes." This statement suggests that the MBTA's action was a willful misrepresentation to the Labor Department. In fact, the MBTA's refusal to arbitrate except in accordance with its enabling legislation, Mass. Gen. Laws, ch. 161A, § 19 *et seq.*, was mandated by the amendment of Mass. Gen. Laws, ch. 161A, § 29 by 1980 Mass. Acts 581 ("Chapter 581"), § 12 and by the decision of the Supreme Judicial Court of Massachusetts in *Massachusetts Bay Transportation Authority Advisory Board* v. *Massachusetts Bay Transportation Authority*, Mass. Adv. Sh. (1981) 403, 410. (Res. App. 48a-59a.) Although this opinion was not issued until February 12, 1981, the MBTA was made aware of the position of the Court on November 28, 1980, when the preliminary and unpublished order which precipitated both the shutdown of the MBTA and the enactment of Chapter 581 was rendered.

9. On page 9, the Transit Union alleges that in 1979 the MBTA and the Transit Union "had negotiated a settlement of the changes in the Basic Agreement to be binding until 1980. . ." The MBTA contends that the agreement negotiated in 1979 was a new agreement which contained language approving it to the extent consistent with 1978 Mass. Acts 405 ("Chapter 405").

10. On page 10, the Transit Union alleges that following the MBTA's refusal to arbitrate unrestricted by Chapter 581, the Transit Union filed an amended complaint seeking an injunction to compel unrestricted arbitration and other relief. Relief was sought in the district court, however, only after substantially the same relief was sought in the state court by the Transit Union, the Machinists Union and twenty-three other unions representing MBTA employees (Res. App. 76a-82a). Only when the Transit Union and the Machinists Union were unable to obtain all the relief requested (Res. App. 60a-64a) did they choose to pursue their claims for relief against Chapter 581 in the federal court.

II. *Facts Regarding the Machinists Union.*

The MBTA disagrees substantially with facts regarding Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers ("the Machinists Union") as set forth in the petition. In particular, the MBTA disagrees with the following statements:

1. On page 11, the Machinists Union alleges that Boston Lodge 264, District 38, International Association of Machinists and Aerospace Workers, AFL-CIO is signatory to the 1974 § 13(c) agreement. That claim is not consistent with the undisputed facts set forth in affidavits to the district court. (App. 65a-70a.)

2. On pages 11 and 12 of the petition, the Machinists Union alleges that the collective bargaining agreement between the MBTA and the Machinists Union covered the period from January 1, 1976 to December 31, 1977, and continued from year to year thereafter. There is no collective bargaining agreement between the MBTA and the Machinists Union. The district court, First Circuit and the state court (Res. App. 71a-72a) have

found that the last agreement terminated pursuant to its terms on December 31, 1977, several months before the enactment of Chapter 405, and three years before the enactment of Chapter 581.

III. *Proceedings Below*

The MBTA adopts the Summary of Facts and Prior Proceedings as set forth in the Respondent, Commonwealth of Massachusetts' Brief in Opposition as its statement of the proceedings below.

Reasons Why the Writ Should be Denied.

The MBTA joins the arguments of the Commonwealth as set forth in the Respondent Commonwealth of Massachusetts' Brief in Opposition. Further, the MBTA submits that the writ should be denied because neither the decision below nor the record raises the questions presented in the petition.

1. The first question presented in the petition (p. i) is whether § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c) ("UMTA") and ("§ 13(c)"), creates binding federal rights. The Court of Appeals in its Memorandum and Order on Motion for Rehearing held that § 13(c) of UMTA did create such rights (Pet. App. E5).

2. The second question presented in the petition (p. i), is whether a state may pass laws nullifying the rights created by § 13(c). A comparison between the issues in the instant case and those in this Court's recent decision in the matter of *United Transportation Union* v. *Long Island Railroad Company*, No. 80-1925, 50 U.S.L.W. 4315 reveals that the state laws in issue do not nullify any rights created by § 13(c) of UMTA.

In *Long Island Railroad*, the State of New York converted the Long Island Railroad from a private stock corporation to a public benefit corporation in order to eliminate Railway Labor Act coverage and bring Long Island Railroad employees under the state's public employee labor relations law. This Court held that the states cannot erode federal authority in the area of railroad labor relations which has traditionally been subject to comprehensive federal regulation.

UMTA § 13(c) is not a comprehensive federal scheme for regulating labor relations for local public transit employees. Since 1947, the inception of public control of mass transit in metropolitan Boston, the former Metropolitan Transit Authority employees, now MBTA employees, have been public employees. *Hansen* v. *Commonwealth*, 344 Mass. 214, 218 (1962). MBTA employees are not covered by the National Labor Relations Act, 29 U.S.C. 151 et seq. *Local Division 589, Amalgamated Transit Union, AFL-CIO* v. *Amalgamated Transit Union*, 295 F. Supp. 630, 632 (D. Mass. 1969). MBTA employees are not covered by the Railway Labor Act, 45 U.S.C. § 151 et seq., by virtue of the definition of "carrier", 45 U.S.C. § 151. MBTA employees are not covered by the Massachusetts General Laws relating to public employee labor relations. Mass. Gen. Laws, ch. 150E (formerly Mass. Gen. Laws ch. 149, § 178F et seq.). *Massachusetts Bay Transportation Authority* v. *Labor Relations Commission*, 356 Mass. 563, 566 (1970). Thus, collective bargaining for MBTA employees is governed solely by Mass. Gen. Laws, ch. 161A, § 19 et seq. and Massachusetts common law.

While § 13(c) requires that collective bargaining rights of employees of mass transit systems receiving federal transit aid be continued, the precise rights to be protected are not specified either in the act itself or in the Labor Department's Section 13(c) guidelines, 29 C.F.R. part 215.

In view of the declaration of "inherent" management rights declared by Chapter 581, a subsidiary issue properly to be determined by the Massachusetts state courts is whether the collective bargaining agreement interfered with the MBTA's exclusive managerial prerogatives not subject to delegation, interference or control by collective bargaining agreements. *See Berkshire Hills Regional School District* v. *Berkshire Hills Education Association*, 375 Mass. 522 (1978) and cases cited therein.

The Supreme Judicial Court of Massachusetts has stated that the Massachusetts General Court can remove considerable uncertainty concerning which subjects are proper matters for collective bargaining between public agencies and their employees by defining those subjects that can or cannot be incorporated in a binding collective bargaining agreement. *Boston Teachers Union* v. *School Committee of Boston*, 370 Mass. 455, 464 n.5 (1976). The General Court followed this procedure by enacting Chapter 405 and Chapter 581.

Until the enactment of Chapter 405 and Chapter 581, neither the MBTA nor its labor organizations had tested in the Massachusetts state courts the limits of their authority to bargain collectively or to enforce any of the provisions of the collective agreements for which they had bargained. However, with the plethora of litigation instituted by MBTA labor organizations since the enactment of these statutes,[1] there will be ample opportunity for the state court to render its opinion on the parameters of collective bargaining between the MBTA and its employees. The state court may well decide, that by the enactment of Chapter 405 and Chapter 581, labor organizations representing the MBTA employees have lost nothing.

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[1] For a partial survey of such litigation, *see* brief of amicus curiae, Massachusetts Bay Transportation Authority, in support of petitioners in *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, No. 81-411.

Accordingly, since the rights of MBTA employees to bargain collectively are both governed and created by state law, and the petitioners have failed to establish that Chapters 405 and 581 infringe upon any such rights held by them prior to the enactment of those statutes, it follows that the claimed conflict between Chapters 405 and 581 and Section 13(c) simply does not exist.

3. The final question presented in the petition (p. i) is whether a state may, consonant with the Contract Clause, U.S. Const., Art. I, § 10, pass legislation impairing rights set forth in agreements mandated by § 13(c) and collective bargaining agreements. There is, however, no contract clause problem since the statutes do not purport to impair any existing contract.

As to the so-called 1974 § 13(c) agreement, the First Circuit, in its Memorandum and Order on Motion for Rehearing (Pet. App. E3) held that the § 13(c) assurances were subject to specific state statutes to the contrary and expressed doubt as to whether the § 13(c) agreement was indeed a contract. As to the petitioners' collective bargaining agreements, a state court has held that the machinists contract has expired. *Lodge 264* v. *MBTA*, Suffolk Superior Court No. 51214 (Res. App. 71a-72a), appeal filed December 2, 1981 and in another matter has refused to declare that the Local 589's collective bargaining agreement is still in effect pursuant to the rollover clause. *Local 589* v. *MBTA*, Suffolk Superior Court No. 51582 (Res. App. 73a-75a). In the latter decision the court noted that Local 589 has conceded that Chapter 405 and Chapter 581 will govern future negotiations and agreements (Res. App. 73a). As the Court of Appeals found, neither the Commonwealth nor the MBTA attempted to apply the statutes retrospectively (Pet. App. D57). Therefore, the facts presented do not raise the question of whether the state passed legislation impairing rights set forth in any contract.

Conclusion.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,
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ARBITRATION AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

AND

DIVISION 589, AMALGAMATED TRANSIT UNION

THE UNDERSIGNED IMPARTIAL UMPIRE, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and having duly heard and considered the proofs and allegations of the Parties, hereby AWARDS that:

> The July 10, 1978 amendments to Section 19 of Chapter 161A of the General Laws, and the M.B.T.A.'s insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the pre-existing 13(C) Agreements executed by the parties.

/s/ ____________________

WILLIAM J. FALLON
IMPARTIAL UMPIRE

DATED: August 13, 1979.
BOSTON, MASSACHUSETTS

ARBITRATION DECISION

DISPUTE RE:
13(C) AGREEMENT

DATE OF AWARD: AUG. 13, 1979

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

and

DIVISION 589, AMALGAMATED TRANSIT UNION

This matter was presented to the undersigned Arbitrator at hearings held in Boston, Massachusetts, on March 23 and May 3, 1979. At the hearings Joseph A. Emerson, Esq., Morgan, Brown, Kearns and Joy, One Boston Place, Boston, Mass., and Robert J. Lewis, Esq., appeared for the Authority; and I. J. Gromfine, Esq., and Douglas Taylor, Esq., Gromfine and Sternstein, 1200 Fifteenth Street, N.W., Washington, D.C., represented the Union.

Post-hearing briefs were submitted on behalf of both parties and were received by the Arbitrator on June 25, 1979.

From the suggestions of counsel and the record as a whole, the issue is determined to be:

> Whether the 1978 Amendments to Chapter 161A of the General Laws and the insistence of the MBTA in arbitrating interests disputes in accordance with those amendments, are in conflict with the 13(C) Agreements of the parties?

ANALYSIS

The collective bargaining agreement expired on December 31, 1977. The parties attempts to negotiate a new agreement continued into May 1978 without success. On May 5, 1978 Richard J. Guiney, Recording Secretary of Division 589, wrote to Authority Chairman Kiley invoking arbitration. In pertinent part his letter read:

> — In view of the Authority's position, it is apparent that the parties will not be able to reach agreement on the terms of a new contract. Accordingly, pursuant to Section 601 of the existing agreement, notice is hereby given that the issues in dispute between us be submitted to a Board of Arbitration to be selected in accordance with the provisions of Section 103 of the agreement.
>
> The Union designates, as its representative on the Board of Arbitration, Mr. I. J. Gromfine of 1200 15th St., N.W., Washington, D.C., reserving the right to substitute for Mr. Gromfine in the event he is unable or unwilling to serve or continue to serve prior to the issuance of an Award. (Union Ex. 11)

On May 11, 1978, Kiley replied to Guiney, agreeing to proceed to arbitration and naming Allan W. Drachman, Esq., as Authority representative on the Arbitration Board, but reserving the Authority's rights as follows:

> — There is currently before the General Court, Senate Bill #1510 relating to the M.B.T.A. arbitration process which, if enacted into law, will create rights and duties affecting the methods of conducting arbitrations. The Authority is willing to proceed in accordance with your letter but any action it takes thereunder must be taken in light of this legislation.
>
> In the event that this legislation is enacted into law and becomes effective, the Authority expressly reserves whatever rights it may have under such statute, and specifically does not waive such rights.
>
> Subject to the foregoing, the Authority designates as its representative in this matter Allan W. Drachman, Esq., 185 Devonshire Street, Boston, Massachusetts, 02110, reserving the right of substitution and re-substitution. (Union Ex. #12).

In the ensuing days correspondence was exchanged between Mr. Drachman and Messrs. Sternstein and Gromfine, about requesting a list of five arbitrators (experienced in transportation) from the American Arbitration Association. After written request to the AAA was made, Drachman wrote to AAA Regional Director Reilly on July 5, 1978 noting that pending legislation required the arbitrator to be a legal resident of the Commonwealth of Massachusetts, and experienced in state and local finance. He requested that Reilly keep this in mind when formulating the panel.

Mr. Reilly requested Gromfine's comments on Drachman's July 5th letter, and Gromfine replied to the effect that Reilly had no right to consider conditions imposed by pending legislation and that the arbitration was commenced and should proceed in accord with Section 103 of the Agreement.

On July 13, 1978 the Governor of Massachusetts signed into law Chapter 405 of the Acts of 1978. On July 20, 1978, Warren J. Higgins, Acting Chief Executive Officer of the MBTA wrote to Recording Secretary Richard J. Guiney of Division 589, noting the enactment of Chapter 405 and stating that the

Authority therefore withdraws its designation of Allan Drachman as Authority Arbitrator and desires to proceed to mediation as provided in the newly enacted General Laws, Chapter 161A, Section 19D.

On July 25, 1978, Mr. Guiney replied to the request of Higgins, noting that counsel for the Union needed time to study the recently enacted legislation and to determine what position to take in respect to the arbitration already in progress. Guiney stated that he hoped the study would be completed shortly and as soon as it was he would respond directly to Higgins' request for mediation. (Union Ex. #26).

On August 28, 1978 Kiley wrote to Guiney advising that if no agreement was reached on a mediator on or before September 8, 1978, the Authority would petition the Board of Conciliation and Arbitration to appoint a Mediator pursuant to Chapter 161A, Section 19D. (Union Ex. #27).

On September 6, 1978 Guiney wrote to Kiley observing that the Union was convinced certain portions of the 1978 amendments to Section 19 of Chapter 161A of the General Laws violated important constitutional rights of Local 589 and its members, but those portions of the new law dealing with mediation were not objectionable, and the Union was willing to submit to mediation provided:

> In so doing we intend in no way to concede that the portion of the amendments which establishes arbitration procedures and standards in conflict with our labor agreement and 13(c) agreements is constitutional. (Union Ex. #20).

Meanwhile on June 1, 1979, D. V. Maroney, Jr., International President of the Amalgamated Transit Union, wrote to Secretary of Labor, Ray F. Marshall, expressing concern about the serious potential conflict between the provisions of Section 13(C) of Urban Mass. Transportation Act, as amended (49 U.S.C. 1609 (c)) and the provisions of Massachusetts Senate Bill No. 1510, which had been passed by the Senate and was then awaiting action by the House. Maroney contended that:

> — The bill, in its present form, as attached hereto, enacted into law, would render the MBTA unable to comply with currently valid and binding S13(C) commitments to arbitrate and to preserve existing collective bargaining

> and arbitration rights as provided by presently applicable state law and labor agreements.
>
> These contractual commitments to arbitrate are contained in employee protective arrangements which have been certified by the Department of Labor as "fair and equitable" and made part of each and every contract of assistance for all MBTA projects funded under the Act during the 14 years of its existence. Close to $1 billion in federal subsidies have been awarded to the MBTA on the basis of these S 13(C) conditions.
>
> The issue squarely presented by the bill is whether these commitments, solemnly given as a condition of receiving federal transit funding, may, while still in full force and effect, be rendered invalid and unenforceable by subsequently enacted state law. — (Union Ex. #30).

Secretary Marshall responded to Maroney's letter on June 27, 1978, stating that he asked Assistant Secretary of Labor, Francis Burkhardt, to undertake a complete review of the matter if Senate Bill No. 1510 was enacted.

Following enactment of Senate Bill No. 1510 on July 13, 1978, Burkhardt undertook a review of the matter. On September 12, 1978 he wrote to Maroney, (with a copy to Kiley) in relevant part as follows:

> — At issue is whether the interest arbitration provisions of the new state law are in conflict with the existing Section 13(C) arrangements entered into by the ATU and MBTA and certified by the Department of Labor. —

Burkhardt noted that the Secretary of Labor was not authorized to resolve disputes over the interpretation, application or enforcement of the 13(C) arrangement, but that paragraph (13A) of the December 10, 1974, 13(C) agreement between the MBTA and the ATU, provides for arbitration of any such dispute. He urged the parties to make every effort to reach agreement, or to invoke the arbitration procedures of the 13(C) Agreement.

On September 22, 1978, Division 589 Recording Secretary Guiney wrote to Kiley invoking the arbitration procedure outlined in Section 104C. 9. of the Collective Bargaining Agreement which is incorporated by reference in Section 13 of the December 10, 1974, 13(C) Agreement. Guiney also noted that the arbitration over the new law's conflict with the 13(C) Agreement should not delay or interfere with any mediated bargaining the Union had agreed to begin. (Union Ex. 33).

On October 13, 1978, Kiley replied to Guiney that he was unaware of any direct discussions or communications between the MBTA and Division 589 about an interpretation of the 13(C) Agreement prior to Guiney's letter of September 22, 1978. He requested information about the dispute and suggested that the invocation of arbitration was premature. (Union Ex. 35).

Guiney replied to Kiley on October 31, 1978 stating, inter alia:

> — As we indicated in our letters of September 6 and 29 of this year, Local 589 does not believe that those portions of the new law which require mediation, by themselves, impair the constitutional rights of our members. Similarly the new mediation requirement does not constitute a substantial impairment of our 13(C) Agreement, in the view of Local 589. However, each and every remaining section of the new law does impair rights guaranteed by the existing 13(C) Agreements. Specifically (for purposes of clarity we refer to the Agreement executed in 1974), Sections 2, 3(a), 3(b), 4, and 13 are impaired by operation of the 1978 Amendments to Chapter 161A, in that the new law purports to alter the number of arbitrators which may be designated to decide an interest arbitration dispute, the method of selecting a neutral arbitrator, the evidence he may consider, the weight he may attach thereto, and the devices he may use in fashioning an award. All of the foregoing modifications of our arbitration procedures, viewed separately or as a whole, are substantial impairments of the rights of members of Local 589 under the 13(C) Agreements. — (Union Ex. 36).

Subsequent MBTA applications for federal grants for various projects were certified by the Department of Labor noting that:

> — It is recognized that depending on the resolution of the current controversy, there may be the need for further action by the parties and/or the Department of Labor regarding the existing 13(C) arrangement.
>
> In the interim, however, certification shall be without prejudice to, or waiver of, any of the rights and remedies of the parties and shall not be taken as affecting the ap-

propriate disposition of these issues in any forum. (Union Exs. 40, 40A, 40B, & 41).

POSITION OF THE UNION

The Union contends that the arbitration procedures invoked for the purpose of obtaining a successor agreement to the one which expired on December 31, 1977, were interrupted by the MBTA acting under a new Massachusetts statute. Further, the Department of Labor suggested this arbitration as a first step in establishing the proper interests arbitration procedure to be followed; whether under the new state statute, or, pursuant to Sections 601, 100 and 103 of the Agreement which expired on December 31, 1977.

The Union maintains that there is no basis for the Authority's claim that this arbitration is premature. The fact that the Department of Labor urged it, is sufficient to dispose of that claim. Moreover, the MBTA Chairman stated prior to the passage of new statute that it was the MBTA's intention to follow the provisions of the amendments, and this was repeated many times following passage of the amendments.

The Union argues that Chapter 161A, Section 29, makes it clear that the MBTA is authorized to continue the interests arbitration pursuant to the Agreement rather than the amended law if it is obliged to do so in order to continue to receive federal funding; to wit:

> It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purpose of this chapter shall, to the extent necessary to enable the commonwealth or its subdivision to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter. (Union Ex. 48, Authority Ex. 3, S. 29).

The Union submits that the December 10, 1974 13(C) Agreement guarantees the continuation of arbitration in accordance with the arbitration provisions in the Agreement between the MBTA and Local 589. The 13(C) Agreement preserved the interest arbitration procedures refined over the years and followed for generations by the parties as an alternative to economic warfare. The employees have no lawful right to strike. They agreed to a tripartite Board of Arbitration, chaired by a professional arbitrator experienced in transportation, with full opportunity to place in evidence such evidence and to argue such criteria as either party deemed appropriate. Section 4 of the December 10, 1974, 13(C) Agreement, states in relevant part:

> The collective bargaining rights of employees of the Authority represented by Labor Organizations signatory hereto including the right to arbitrate labor disputes and to maintain Union security and check-off arrangements, to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued.

The Authority appears to argue that the rights of employees guaranteed by 13(C) are only preserved to the extent that the Massachusetts legislature chooses to continue them. It follows therefore that if a statute had been enacted in 1978 taking away all rights to bargain collectively or to arbitrate disputes, and the MBTA had broken off negotiations in compliance therewith, that such action would not have been inconsistent with the 13(C) Agreement.

Merely to state that contention is to expose its patent falaciousness. Moreover, it ignores the fact that the "applicable laws" reference in Section 4 was inserted only to cover situations where no existing collective bargaining agreement provided for arbitration, and where there was a contract arbitration provision, it was controling and must be preserved if different from applicable laws.

The MBTA negotiated the 13(C) Agreement as a State entity having a direct interest in obtaining federal funding. The MBTA was the agent of the State and authorized by Section 29 of Chapter 161A to make *any* guarantee necessary to obtain federal funding. In this context it is not conceivable that Local 589 would agree to, let alone propose a 13(C) Agreement (Authority Ex. 6), that would allow the State to be free to wipe out the Union's rights to collective bargaining and interest arbitration as then set forth in its labor agreement.

It is equally inconceivable that the Secretary of Labor would have certified Section 4 of the 13(C) Agreement as having met the requirements of the UMTA, if Section 4 permitted the interpretation given to it by the Authority. The plain and clear meaning of the December 10, 1974, 13(C) Agreement is to assure the kind of interest arbitration then existing in the collective bargaining agreement, unless and until it was changed by negotiations or arbitration.

The interest arbitration provisions of the new law represent a clear and serious impairment of the interest arbitration provisions in the collective bargaining Agreement, which were preserved and protected by the 13(C) Agreement. For one, there is an inherent impairment in regulating interest arbitration by statute rather than by contract. If contract arbitration is unworkable or unfair the parties can change it. Not so, with interest arbitration regulated by statute.

The new statute requires a single arbitrator instead of the tripartite board that has been an integral part of the process since at least 1920. Interest arbitration is an extension of the collective bargaining process, and not an adversary proceeding in the usual sense. If the process is to survive as a viable alternative to economic warfare it must have a reasonable measure of acceptability to both sides. It is vitally important to have a tripartite process so the neutral arbitrator can learn in executive sessions the depth of commitment each side has to the various issues, and to allow the partisan arbitrators to become intimately involved in the execution of an award which will be the basis of their relationship for the upcoming years.

Irreparable injury is done to the process by the elimination of the tripartite board, and in a most fundamental respect the new statute conflicts with the 13(C) Agreement which preserves the continuation of tripartite board.

Under the labor agreement the neutral arbitrator is selected from a list from the American Arbitration Association of arbitrators "experienced in transportation." Under the new law the arbitrator must be a legal resident of Massachusetts and experienced in state and local finance.

The Union submits that there are few if any legal residents of Massachusetts who are experienced in state and local finance, and qualified by training and experience to handle a complex interest arbitration case in the transit industry. The obvious purpose of this portion of the new law is to limit the selection of a neutral to persons with no experience in transit arbitration, who may be more influenced by local political pressures, and likely to give disproportionate weight to management's claims about the impact on the tax structure of increases in labor costs. There is a diminished likelihood that a neutral will be selected who can give the Union a fair shake, and here again the new statute is in direct conflict with the negotiated interest arbitration provisions which the 13(C) Agreement was designed to protect.

The Union maintains that the stated criteria of the new law, which are a required guide for the arbitrator, are biased in favor of management and ignore the traditional criteria followed by arbitrators in transit arbitrations. The collective bargaining Agreement imposes no criteria to bind the tripartite board. Both sides are free to introduce whatever criteria it wishes, and the board is free to give such weight to the criteria as it deserves. Under the new law the arbitrator must consider each criterion separately and report his conclusion in respect to each one. Moreover, the arbitrator is required to rely primarily on certain factors such as financial ability to pay, including the statutory requirement of advisory board approval of the Authority's budget, the financial ability of the Commonwealth and individual communities, the overall compensation of employees including vacations, holidays and other pay for time not worked, together with all fringe benefits, and a comparison of wages, hours and conditions with other employees performing similar services within the Commonwealth, and other employees generally in public and private employment within the Commonwealth.

While the factors of change in the cost of living, hazards of employment, and changes in other factors during the pendancy of the arbitration are neutral, the remaining five factors are all biased in favor of management. Excluded from consideration are a comparison of private employees including those engaged in transportation work, and transit employees in other states. Management has tried in arbitrations to obtain the kind of restrictions and mandatory guidelines provided by the statute, and it has usually failed to accomplish this.

The problem is that management's arguments are now listed in the statute as mandatory criteria to be considered and reported on by the arbitrator, while the Union's arguments are given no commensurate status. The overall affect is to advantage the M.B.T.A. in any interest arbitration and to disadvantage the employees.

Under the new law an arbitrator is prohibited from making an award which contains any provision for salary adjustments after the expiration of the contract period covered by the award. When the 13(C) agreement was negotiated in 1974 the collective bargaining agreement contained a cost of living "roll-over" provision. Section 3(a) of the 13(c) Agreement assured that this benefit would be preserved, and the new law's prohibition of such a benefit presents a serious conflict with the 13(C) Agreement.

The Union also points out that in its 1979 Budget Committee Report the M.B.T.A. Advisory Board flatly asserted that:

> Under the new arbitration law an arbitrator will be compelled to refuse to grant any increase in wages and benefits for 1979, and therefore the Advisory Board does not wish to allow any funds for wage increases in the 1979 M.B.T.A. budget. (Union Ex. 45).

For all of these reasons, the Arbitrator should rule that the new law, and management's insistence on arbitrating interest disputes in accordance with its terms, instead of the terms of the collective bargaining agreement, constitutes a conflict with the provisions of the existing 13(C) Agreements negotiated by the parties.

POSITION OF THE AUTHORITY

There is a "legislative scheme" here that began with Chapter 544 of the Acts of 1947 wherein the predecessor of the M.B.T.A., The Metropolitan Transit Authority, was established as a "body politic and corporate and a political subdivision of the Commonwealth." The "scheme" was continued in 1964 by Chapter 563 of the Acts of 1964, whereby the Massachusetts Bay Transportation Authority was created.

In 1947 the M.T.A. acquired all the assets of the Boston Elevated Railway Company, a private corporation, and by Chapter 544 the transit company became publicly owned. Section 19 of Chapter 544 of the Acts of 1947 conferred upon the Authority the right to bargain collectively with its employees and the right to arbitrate disputes. This was the first time in history that public employees in the Commonwealth were given the right to bargain collectively, and it was two decades before the Massachusetts legislature authorized other public bodies to enter into collective bargaining relationships with Labor Organizations. If it had not been for the specific grant of authority in Chapter 544 of the Acts of 1947, there would have been no collective bargaining or arbitration of interests disputes at the M.T.A.

Chapter 563 of the Acts of 1964 continued the right of employees to bargain collectively and to arbitrate interests disputes with the M.B.T.A. The "legislative scheme" continued to be refined by the amendments enacted on July 13, 1978 which were forged to balance the rights and responsibilities of the M.B.T.A. and the labor organizations with which it bargains.

Unlike other public bodies, all of the "legislative scheme" covering labor relations within the M.B.T.A. is set forth in one statutory provision — Section 19 of Chapter 161A. This then is the applicable law affecting the obligation to bargain and the right to arbitrate disputes.

In 1964 the Congress of the United States enacted the Urban Mass Transportation Act, which provides a vehicle for federal funds to the states for transportation purposes. Among its provisions was the so-called Section 13(C) which treated with labor protective arrangements. Pursuant to the UMTA, the Authority and the Union entered into a series of 13(C) agreements which provided the agreed upon labor protective arrangements on which the Secretary of Labor based his certification that Section 13(C) had been complied with. Until the July 13, 1978 passage by the Massachusetts legislature of

Chapter 405 of the Acts of 1978, there had been no dispute over the meaning of the December 10, 1974, 13(C) Agreement.

The Authority submits that there is no evidence before this arbitrator of any violation by the Authority of the 13(C) Agreement. There has been no unilateral change in wages or benefits, and no interruption of benefit payments. The Authority has not refused to arbitrate interest disputes. It has complied with paragraph 4 of the 13(C) Agreement by proceeding, with the reluctant concurrence of the Union, through the initial mediation step of the "legislative scheme" relative to interest arbitration, thereby respecting the paragraph 4 language guaranteeing the:

> — right to arbitrate any labor dispute
> — as provided in applicable laws and/or the existing collective bargaining agreement.

The Authority's position is that if interest arbitration is to proceed, then it must conform to the provisions of Section 19(C) et seq. of Chapter 161A of the Massachusetts General Laws. Interest arbitration must conform to the "legislative scheme" set forth in Chapter 161A.

The December 10, 1974, 13(C) Agreement which binds the Authority and the Union, provides in paragraph 4 that:

> The collective bargaining rights of employees of the Authority represented by Labor Organizations signatory hereto including the right to arbitrate labor disputes and to maintain Union security and check-off arrangements to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued.

All of the preceding 13(C) Agreements contain similar language refering to the right to arbitrate *as provided in applicable laws*. Even the Union's draft of the proposed 13(C) agreement in late 1974 contained such language:

> — including the right to arbitrate labor disputes . . . as provided by applicable laws
> — (Authority #6).

The Authority submits that it is willing to arbitrate interest disputes in accordance with "applicable laws" — to wit: Chapter 161A, Section 19c et seq. of the M.G.L. This is entirely consistent with Section 4 of the December 10, 1974 13(C) Agreement.

In 1970 in a case decided by the Supreme Judicial Court involving the M.B.T.A. and the State Labor Relations Commission (356 Mass. 563), Justice Cutter wrote that the Commission had no jurisdiction over the Authority because no statute granted such jurisdiction. Such jurisdiction was not then part of the "legislative scheme" for the labor relations of the Authority. The legislature thereafter changed the "legislative scheme" and placed the Authority under the jurisdiction of the Labor Relations Commission. (Chapter 514 of the Acts of 1970 amended Chapter 161A and inserted Section 19A). Thus, unless the Authority is authorized by the legislature to perform some function, as a political subdivision of the Commonwealth, it may not act independently.

The Authority concludes that the phrase "applicable laws" as it appears in paragraph 4 of the December 10, 1974, (13(C) Agreement, must mean the provisions of Chapter 161A, Section 19, authorizing the conditions under which the Authority may arbitrate disputes. Moreover, the Union has agreed with this interpretation in the past. International President Maroney in his letter to Secretary of Labor Marshall while arguing that Chapter 405 of the Acts of 1978 conflicts with the 13(C) Agreement, acknowledged the applicability of state laws. In the first paragraph of that letter he stated:

> . . . The bill . . . would render the MBTA unable to comply with currently valid and binding 13(C) commitments to arbitrate . . . as provided by presently existing state law . . . (Union Ex. 30).

Also, in the May 17, 1979 letter of Attorney Herman Sternstein to Allan Drachman, Esq., it was stated:

> Finally the Authority raised the problem of pending legislation. It is agreed that in proceeding that way, the parties are acting in accordance with the law and contract as they now apply. If and when a new statute becomes the law, as a result of which the rights and obligations of the parties are changed, the parties intend to abide by the law which applies. (Union Ex. 13).

The Authority maintains that the Arbitrator should not undertake an analysis and interpretation of Chapter 405 of the Acts of 1978, for that is the responsibility of the Courts. The Arbitrator derives his authority from the intent of the parties as reflected in the collective bargaining agreement. His role is to interpret the provisions of that agreement, and in so doing there should be no resort to external law. In *Steelworkers* v. *Enterprise Wheel and Car Corp.*, 34 LA 570, the Supreme Court stated:

> — An arbitrator is confined to interpretation and application of the collective bargaining agreement.

In *Steelworkers* v. *Warrior Navigation Co.*, 34 LA 564, the Court stated:

> Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

The Authority argues that here the 13(C) Agreement of December 10, 1974 is the essence of the arbitrator's authority and his decision must confine itself to interpreting that agreement only. The arbitration provision of that agreement in paragraph 13(b) states the authority of the arbitrator, and it does not give him any right to determine whether a conflict exists between a state and federal law, or whether a state law is unconstitutional, or what interpretation should be given a state statute. Nowhere does the 13(C) Agreement confer jurisdiction on the arbitrator to interpret and apply external law. In a similar context, the U.S. Supreme Court defined the role of arbitration in a case dealing with Title VII of the Civil Rights Act of 1964. In *Alexander* v. *Gardner-Denver Co.* 415 U.S. 36 (1974), the Court said:

> . . . As the proctor of the bargain the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement, and he must interpret and apply that agreement in accordance with "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that

> conflict with the bargain of the parties . . . If an arbitral decision is based "solely on the arbitrator's view of the requirements of enacted legislation rather than on an interpretation of the collective bargaining agreement, the arbitrator has exceeded the scope of his submission" and the award cannot be enforced . . .

In deciding the issue suggested by the Union, the Authority submits that the arbitrator cannot avoid ruling on, or interpreting Massachusetts statutory law, for the Union is really grieving an act of the legislature rather than an act of the Authority. The Authority contends that the Court is the proper forum to contest an act of the legislature. Further, for the arbitrator to rule as requested by the Union would result in holding that the Authority must ignore state law. The Union suggested that by invoking Section 29 of Chapter 161A the Authority could disregard the 1978 amendments to Section 19. This assumes that the legislature gave the Authority the right to pick and choose which provisions of the enabling legislation it would follow, and the Authority believes that such an assumption is unwarranted. Where Sections 19C through 19G were added to Chapter 161A some 14 years after the original act, knowing full well the provisions of Section 29, the legislature obviously believed that there was nothing inconsistent with these amendments.

It is the further position of the Authority that the controversy raised by the Union does not come within the purview of the 13(C) Agreement. The 13(C) Agreement requires a nexus to be made between the interests of the employees subject to protection, *as affected by assistance to the project*. The Union has failed to show any connection between this controversy and the federal assistance to any project of the Authority. The 13(C) Agreement wasn't intended to give the parties the right to arbitrate *any* disputes but only those which are traceable to federal assistance. An act of the legislature is not the kind of controversy intended to be covered because there is no connection between that act and the receipt of federal funds.

The Authority also notes that the employees have had a legislative right to bargain collectively and arbitrate disputes for some 17 years prior to the enactment of the Urban Mass Transportation Act of 1964. The fact that a political subdivision of the Commonwealth is receiving federal assistance should not be a bar to the Commonwealth's amending a statute it has long had a right to amend. In *National League of Cities* v. *Usery*, 426 U.S. at 855, the Court said:

> One undoubted attribute of state soverignty . . . is the states power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental function.

Consistent with this decision, a state must also be able to establish arbitration procedures for its employees.

The Massachusetts legislature was not a party to the 13(C) Agreement and therefore it did not voluntarily give up the right to amend a statute it had previously passed. Likewise, it is highly unlikely that the Authority has a right to bargain away rights of the legislature.

In 109 Cong. Rec. 5347-5359, several senators expressed the view that it was never intended that the labor provisions of a 13(C) Agreement would supercede state law in the labor relations area. Secretary of Labor Wirtz confirmed this view at hearings on the U.M.T.A. bill. Accordingly, the 13(C) Agreement should not be construed as a prohibition against the Massachusetts legislature from amending a law it passed in 1964.

Paragraph 4 of the 13(C) Agreement preserves and continues the right to arbitrate labor disputes to the extent such are provided by applicable law and/or existing collective bargaining agreements. Nowhere does it establish how the arbitrator is to be selected, what experience or expertise he shall have, whether there will be one or three arbitrators, or any guidelines that shall be applied in fashioning an award. The 13(C) Agreements only concern is that the right to arbitrate be preserved and continued.

Where the right to arbitrate is given in the first instance by the legislature, then that right can also be modified or amended by the legislature. The 13(C) Agreement merely tracks whatever arbitration process is then in existence. Where the 13(C) Agreement does not establish any specific arbitration procedure, no conflict exists with that instrument as long as the right to arbitrate is preserved.

The arbitrator is urged to adopt the issue suggested by the Authority and to find that the Authority has not violated the 13(C) Agreement, and dismiss the dipute.

DISCUSSION

The employees of the M.B.T.A. were not always public employees. In 1947 and before they were employees of a private corporation, many of whom had a history of collective bargaining and interest arbitration going back some thirty-five years. In the interest of fairness to the employees, Section 19 of Chapter 544 of the Acts of 1947 preserved the long standing collective bargaining and interest arbitration relationship by the following language:

> The trustees shall have authority to bargain collectively with labor organizations representing employees of the

> Authority and to enter into agreements with such organizations relative to wages, salaries, hours, working conditions, health benefits, pensions and retirement allowances of such employees. The employees of the Authority shall submit all grievances and disputes to arbitration pursuant to arbitration provisions in agreements existing at the time of the creation of the Authority or subsequently entered into with the Authority, or, in the absence of such provisions, to the state board of conciliation and arbitration, or other board or body having similar powers and duties.

When they first became public employees, their pre-existing contract provisions for arbitrating disputes were accorded a respected status, as well as a recognition that they could be changed by negotiations or arbitration in subsequent agreements with the Authority. Chapter 544 of the Acts of 1947 also provided that contract arbitration would continue to be the method used to resolve disputes in preference to any public arbitration board.

With the creation of the M.B.T.A. in 1964, the language of Section 19 of Chapter 544 of the Acts of 1947 respecting collective bargaining and the arbitration of disputes, was carried over to Section 19 of Chapter 161A without substantive change. The language was merely tailored to the new concept of managerial directors rather than trustees. The contract method of arbitrating disputes was preserved and protected by the specific language of Section 19.

Also in 1964 Section 29 of Chapter 161A was adopted and it reads:

> S 29. The Authority is authorized and directed from time to time to take all necessary action to secure any fed-

> eral assistance which is or may become available to the commonwealth or any of its subdivision for any of the purposes of this chapter. If any federal law, administrative regulation or practice requires any action relating to such federal assistance to be taken by any department or instrumentality of the commonwealth other than the authority, such other department or instrumentality is authorized and directed to take all such action, including without limitation filing applications for assistance, supervising the expenditure of federal grants or loans and making any determinations and certifications necessary or appropriate to the foregoing, and the authority is authorized and directed to take all action necessary to permit such other department or instrumentality to comply with all federal requirements. It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter.

The arbitrator is persuaded that the Union correctly contended that one of the reasons, if not the principal reason, for the creation of the M.B.T.A. in 1964, was to take advantage of the new federal legislation, the Urban Mass Transportation Act, (49 U.S.C. 1600, *et seq.*) which was established to provide federal funds for mass transportation purposes to cities, towns and political subdivisions only.

The Union also correctly observed that where private transit systems would become public entities to take advantage of the available federal monies, Congress was concerned that employees could lose benefits obtained in collective bargaining in the transition from private to public employment. This was why a critical aspect of the funding arrangements was the labor protective provisions, called the "13(C)" protective conditions from the section reference in the original act, which reads:

49 U.S.C. S 1609 (c)

> It shall be a condition of any assistance under section 1602 of this title that fair and equitable arrangements are made, of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements.

Commencing in 1966 the M.B.T.A. and Local 589 entered into its first 13(C) Agreement. The last such agreement in effect at the time interest arbitration was invoked in 1978 was dated December 10, 1974. The following excerpts from the December 10, 1974, 13(C) agreement are relevant to our inquiry:

> 2. All rights, privileges and benefits (including pension rights and benefits) of employees of the Authority represented by the Union and/or employees having already retired, under the existing collective bargaining agreement shall be preserved and continued for the life of this agreement unless changed, amended, or altered as provided in said collective bargaining agreement.
>
> 3. The collective bargaining rights of employees of the Authority represented by the Union, including the right to arbitrate any labor dispute, as provided in applicable laws and/or the existing collective bargaining agreement, shall be preserved and continued for the life of this agreement, and the Authority agrees that it will negotiate and bargain collectively with the Union on all matters of employee and employer relations, including wages, salaries, hours, working conditions, health and welfare benefits, pension and retirement allowances, in an effort to reach an agreement and failing to agree, the matters will be resolved by arbitration as provided in the existing collective bargaining agreement.
>
> 4. In the case of any labor dispute arising under or in connection with the terms and provisions of this agreement where collective bargaining does not result in a satisfactory settlement, the same may be submitted to arbitration in accordance with the arbitration provision set forth in the then existing collective bargaining agreement. The term "labor dispute", as used in this paragraph, shall be broadly construed and shall include any controversy concerning wages, salaries, hours, working conditions or benefits including health, and welfare, sick

> leave, insurance or pension or retirement provisions, the making or maintaining of collective bargaining agreements, the terms to be included in such agreements, the interpretation or application of such agreements, the adjustment of grievances, and any claim, difference, or controversy arising out of, or by virtue of, the within arrangements for the protection of employees.

The arbitrator is unable to adopt the Authority's interpretation that the phrase — *as provided in applicable laws* found in Section 3 of the December 10, 1974, 13(C) Agreement, means as provided in the new amendments to Section 19 of Chapter 161A which took affect on July 13, 1978. While arguably such a meaning could reflect the intent of the parties, a critical examination of the purpose of 13(C) agreements, the text of the December 10, 1974, 13(C) Agreement, and the legislative history of the M.B.T.A. and the M.T.A., makes it most unlikely that this was their intent when they adopted the December 10, 1974, 13(C) Agreement.

Section 2 of the December 10, 1974 13(C) Agreement expressly limits changes in privileges and benefits, except as provided in the collective bargaining agreement.

Section 3 states that the collective bargaining rights of employees as provided in applicable laws and/or existing collective bargaining agreements, including the right to arbitrate any labor dispute, shall be preserved and continued for the life of this Agreement. This refers to those rights of employees in existence at the time of the adoption of the 13(C) Agreement. Moreover, the phrase — "as provided in applicable law", refers to situations where there are no collective bargaining agreements dealing with arbitration, and where such agreements exist the "and/or" appears to provide that the arbitration provisions of the agreement control when applicable law provides for a different arbitration procedure. The same sentence concludes with the requirement that matters not settled by negotiations will be resolved by arbitration *as provided in the existing collective bargaining agreement.*

Section 4 reiterates that arbitration in accordance with the arbitration provision in the existing collective bargaining agreement will be utilized for unresolved labor disputes, and it then goes on to define "labor dispute" and provide that the term shall be broadly construed including among other things any controversy arising out of, or by virtue of, the within arrangements for the protection of employees.

The Authority's position that the July 13, 1978 amendments to Chapter 161A Section 19, represents the applicable law governing interest arbitration, because the legislature never relinquished its right to amend Chapter 161A section 19, constitutes an unacceptable premise. If it were true, the legislature could presumably eliminate collective bargaining and arbitration for employees and thereby negate the Authority's 13(C) commitments to preserve and continue all employee benefits. Obviously this would create a conflict between the 13(C) Agreement and state law requiring ultimate resolution by the courts. The same kind of conflict was created here when the legislature passed and the Governor signed the amendments to Section 19 of Chapter 161A, and the Authority maintained that it had to proceed to interest arbitration under the new amendments rather than under the arbitration provisions in the collective bargaining agreement.

It cannot be seriously disputed that one of the benefits protected and continued by the December 10, 1974, 13(C) agreement was the right to proceed to interest arbitration under the arbitration provisions in the collective bargaining agreement in the event of an impasse in negotiations.

Nor can it be seriously denied that that benefit is so circumscribed by the new amendments that it has not been preserved and continued, if the amendments now constitute the interest arbitration procedure that must be observed by the parties.

The Union correctly noted several reasons why the arbitration provisions in the collective bargaining agreement would be eroded by the new amendments. First among these is the fact that arbitration is now regulated by statute rather than by contract. There is no question that the parties do not have the freedom to change statutory arbitration procedures that they do to change their own contract arbitration procedures. Unfair or unworkable statutory arbitration procedures cannot be corrected by the parties themselves in negotiations, or be submitted to a board of arbitration for correction. This is an inherent impairment of the collective bargaining arbitration procedures which were preserved and continued by the 13(C) Agreement.

Requiring interest arbitration before a single arbitrator rather than a tripartite board with a neutral and two partisan arbitrators, also represents an impairment in the collective bargaining arbitration provisions protected by the 13(C) agreement. The input of the partisan arbitrators to achieve an award that is reasonably acceptable, represents an irreplacable loss to the process and converts it into more of an adversary proceeding than the extention of the collective bargaining process that it was.

Requiring the single arbitrator to be a resident of the Commonwealth of Massachusetts and experienced in local and state finance, imposes a significant change on the interest arbitration procedure of the collective bargaining agreement preserved by the 13(C) Agreement. "Experienced in transportation" was the qualification established by the parties and under the new amendments this qualification is no longer required or considered. The Union may well be right that the new statutory qualifications are designed to prevent arbitrators qualified by training and experience to handle a complex interest arbitration from serving as the single arbitrator, and to limit the selection to persons who may be more easily influenced by local political pressures and give disproportionate weight to management's arguments about the impact on the tax structure of increased labor costs for the M.B.T.A. Even if this were not the design of the new law, this change in the selection of the neutral arbitrator, with the emphasis on residency and experience in state and local finance, and no consideration to experience in transportation, makes in increasingly unlikely that the person selected can give the Union a fair shake, and this impacts adversely on the contract arbitration provisions protected by the 13(C) Agreement.

Section 19F of Chapter 161A requires the arbitrator to rely primarily on 9 specified factors in determining the basis of an award. As I read these factors, the arbitrator is prohibited from considering wages, benefits and conditions received by employees in comparable transit properties outside of Massachusetts. Such a comparison has been traditionally considered one of the priority elements in any interest arbitration in the transit industry, and its elimination can only be viewed as stacking the deck against the employees, and a devastating erosion of the contract arbitration procedure protected by the 13(C) Agreement.

Most all the listed factors in Section 19F are normally argued and considered in an interest arbitration, but now Section 19G requires the arbitrator to give a written analysis of *all* the statutory factors applicable to the procedures, without requiring the production of evidence relating to these factors by either party. Moreover, management's traditional arguments are now listed in the statute as mandatory criteria to be considered and addressed by the arbitrator, while the Union's traditional arguments are either unavailable or given no such comparable status.

The Union correctly argued that the overall effect of Section 19F and G of Chapter 161A, was to provide management with an advantage in any interest arbitration while disadvantaging the employees.

The collective bargaining agreement in effect when the December 10, 1974, 13(C) Agreement was negotiated contained a cost of living "roll-over" provision. It was awarded by the Harry H. Platt arbitration board in 1973 to protect employees against the ravages of inflation during the often lengthy periods between collective bargaining agreements when negotiations or arbitration was in progress. Section 19G of the new statute prohibits an arbitrator from awarding a "roll-over" cost of living provision, and this prohibition constitutes a clear conflict with the employee benefits protected by the 13(C) Agreement.

The Authority's argument that interest arbitration must conform to the legislative scheme set forth in Chapter 161A, Section 19, and that this does not conflict with the December 10, 1974 13(C) Agreement cannot be adopted. While another forum may find that interest arbitration must conform to the new amendments to Section 19 of Chapter 161A, there are numerous conflicts between these new amendments and the 13(C) Agreement as indicated previously. What those conflicts mean is not for this arbitrator to say, but the finding is required that the conflicts exist and are substantial and substantive.

Lengthy arguments were advanced by the Authority supportive of a "legislative scheme" that didn't conflict with the 13(C) Agreement which only guaranteed interest arbitration, not the form it should take. After the Authority urged the arbitrator to adopt these arguments, it thereupon argued that the arbitrator should not undertake an analysis of Chapter 405 of the Acts of 1978, for that is the responsibility of the courts. There is a logical inconsistency he[illegible]hat cannot be reconciled.

It would be far easier to avoid construing statutes to determine whether they conflict or not with collectively bargained agreement, but this task cannot be avoided when the dispute which the arbitrator is charged with deciding is focused on this very point. Moreover, the Authority's argument that the right to arbitrate is all that is protected by the 13(C) Agreements, and not the form arbitration is to take, is like saying that the right to wages is protected but not the amount.

The Authority also maintained that the instant dispute does not come within the purview of the 13(C) Agreement because the Union failed to show any connection between this controversy and the federal assistance to the project. The fact that the new amendments to Section 19 of Chapter 161A purport to establish arbitration procedures for *all* M.B.T.A. employees, necessarily means that *any* M.B.T.A. employees affected by federal assistance have had those rights and benefits ostensibly protected by the 13(C) Agreement, compromised by the newly enacted statutory arbitration.

The Authority also contends that the legislature never gave up its right to amend Chapter 161A, Section 19, but when it authorized the M.B.T.A. in Section 29 of Chapter 161A to take all necessary action to secure any federal assistance which is or may become available to the Commonwealth, it of necessity assumed some responsibility for the necessary actions taken by the M.B.T.A., including the execution of 13(C) Agreements. As stated earlier, it is not the arbitrator's responsibility to determine what deference will be accorded to the July 10, 1978 amendments to Chapter 161A, Section 19, but it is my finding that those amendments clearly conflict with the 13(C) commitments made by the Authority with Local 589.

AWARD

The July 10, 1978 amendments to Section 19 of Chapter 161A of the General Laws, and the M.B.T.A.'s insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the pre-existing 13(C) Agreements executed by the parties.

William J. Fallon
Impartial Umpire

August 13, 1979.
Boston, Mass.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DOCKET ENTRY
CIVIL ACTION NO. 79-2059-S

GEORGE P. ADAMS, ET AL.,
PETITIONERS,

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
RESPONDENT.

MEMORANDUM AND ORDER

December 24, 1980

SKINNER, D.J.

Respondent Massachusetts Bay Transportation Authority [MBTA] brought this action in the Supreme Judicial Court of Massachusetts pursuant to M.G.L. c. 231A to vacate an arbitration award issued under a labor agreement that the MBTA and Local Division 589, Amalgamated Transit Union [Local 589] entered into pursuant to § 13(c) of the Urban Mass Transportation Act of 1964 [UMTA], 49 U.S.C. § 1609(c). Petitioners Adams et al., who are officers of Local 589 and defendants in the state court action, seek to have this case removed to federal court pursuant to 28 U.S.C. § 1441(b).

Section 13(c) of UMTA provides that as a condition to receiving federal assistance for urban transportation projects, state and local agencies must make "fair and equitable arrangements . . . as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance." To implement this section, the Department of Labor has promoted the negotiation of labor protective agreements, the so-called § 13(c) agreements, between state transit authorities and their employees' collective bargaining representatives. The § 13(c) agreements are incorporated into the grant contract between the federal government and the transit authority.

In December of 1974, the MBTA entered into a § 13(c) agreement with Local 589. Section 4 of this agreement provides:

> The collective bargaining rights of employees of the Authority represented by Labor Organizations signatory hereto including the right to arbitrate labor disputes and to maintain union security and check-off arrangements, to the extent such are provided for by applicable laws and/or existing collective bargaining agreements, or otherwise shall be preserved and continued.

At the time this agreement was made, the parties had a collective bargaining agreement which stipulated a specific procedure for interest arbitration between the MBTA and its employees. On July 13, 1978, the Massachusetts Legislature enacted Chapter 405 of the Acts of 1978, amending M.G.L. c. 161A § 19, which mandates a different procedure for interest arbitration than that contained in the parties' original collective bargaining agreement.[1]

Subsequently, on September 22, 1978, Local 589 invoked the arbitration provision of the parties' § 13(c) agreement to determine whether Chapter 405 conflicts with the employees' right to interest arbitration established under the § 13(c) agreement. The MBTA consented to such arbitration but reserved its rights to assert in the invalidity of the procedure. Local 589 argues that the § 13(c) agreement preserved the employees' right to interest arbitration according to the procedures set out in the parties' 1974 collective bargaining agreement, and that the Legislature could not alter this right through Chapter 405. The MBTA contended that the § 13(c) agreement permits the Legislature to change the procedures for interest arbitration and, therefore, that the parties must arbitrate interest disputes pursuant to the new procedures in Chapter 405.

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[1] The details of the collective bargaining agreement and Chapter 405 need not be considered in ruling on this petition.

The Arbitrator ruled in favor of Local 589 on August 13, 1979. The award states:

> The July 10, 1978 amendments to Section 19 of Chapter 161A of the General Laws, and the M.B.T.A.'s insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the pre-existing 13(C) [sic] Agreements executed by the parties.

The MBTA then brought a declaratory action in the Supreme Judicial Court of Massachusetts, pursuant to M.G.L. c. 231A, seeking a declaration that: (1) Chapter 405 is not inconsistent with the § 13(c) agreement; (2) Chapter 405 does not violate § 4 of the § 13(c) agreement; (3) employees represented by Local 589 must comply with Chapter 405; (4) the Arbitrator exceeded his powers under section 13(b) of the § 13(c) agreement in issuing the award; (5) the Arbitrator's award constitutes an unauthorized interpretation of state law; and (6) the Arbitrator's award should be vacated. The petitioners now seek to remove this action to federal court pursuant to 28 U.S.C. § 1441(b) on the ground that the MBTA's complaint states a federal cause of action.

28 U.S.C. § 1441(b) provides in part: "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to citizenship or residence of the pajties." The principal inquiry in this case is whether the MBTA could have brought its declaratory action originally in federal court.

The petitioners argue that the Court of Appeals decision in *Local Division No. 714* v. *Greater Portland Transit District*, 589 F.2d 1 (1st Cir. 1978), supports their petition for removal. In *Greater Portland*, the Portland Transit District refused to go to arbitration under the terms of a § 13(c) agreement. The Union then brought suit in federal district court to enforce the arbitration provision of the agreement, relying on 28 U.S.C. § 1331 for jurisdiction. The District Court determined that it lacked jurisdiction over the case. On appeal, the Court of Appeals sought to identify the theory of recovery set out in the Union's complaint. At its narrowest, the complaint merely showed a violation of a private contractual agreement. At its broadest, it showed a violation of § 13(c) of UMTA on the theory that § 13(c) commands interest arbitration. The Court chose a middle ground: the complaint showed a § 13(c) violation because § 13(c) directs a transit district to comply with the § 13(c) agreements it enters into and implies a federal remedy for breach thereof in favor of the transit district's employees. The Court held, accordingly, that the complaint stated a claim "arising under" federal law for purposes of jurisdiction under § 1331. The Court also considered whether the Union had an implied private federal remedy under UMTA to enforce the § 13(c) agreements. Analyzing this question in view of *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), the Court found that the four *Cort* factors were met under the circumstances, *i.e.*, (1) the transit district's employees are a class for whose especial benefit § 13(a) was enacted; (2) there is ample indication of legislative intent to create a remedy; (3) it is consistent with the underlying scheme of § 13(c) to imply such a remedy, and (4) enforcement of the § 13(c) agreements is not a function traditionally relegated to the states. The Court thus held that there exists an implied private right of action in favor of unions to enforce § 13(c) agreements.

The present action is distinguishable from *Greater Portland*. In *Greater Portland*, the Court found jurisdiction on the ground that the Union's complaint showed a violation of § 13(c). Here, however, the MBTA's state court complaint cannot be construed to state a § 13(c) violatin. As indicated in *Greater Portland*, § 13(c) was enacted for the benefit of the transit district's employees. That section confers no rights on the transit district itself; it is, in effect, a one-way street in favor of the employees. Thus, the MBTA's action to vacate the arbitrator's award under the § 13(c) agreement does not satisfy the test of *Cort* v. *Ash, supra*. Although the resolution of this action involves the interpretation of a federally-mandated contract and federal constitutional issues lurk in the background, the action itself does not "arise under" federal law. *See Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149 (1908). This court, therefore, lacks subject matter jurisdiction. The petition for removal must be denied and the case remanded to the Supreme Judicial Court.

That is not the end of the matter, however. Local 589 has instituted a separate action against the MBTA in this court concerning the same subject matter as the MBTA's state court complaint, *Local Division 589, Amalgamated Transit Union, AFL-CIO, CLC* v. *The Commonwealth of Massachusetts, The Massachusetts Bay Transportation Authority and Robert Foster*, C.A. 79-2058-S. The Local filed its complaint on October 15, 1979 seeking a declaratory judgment that the parties'

§ 13(c) agreement requires continuation of interest arbitration procedures found in prior collective bargaining agreements and that Chapter 405 of the laws of 1978 does not vary the employees' right to interest arbitration. The complaint alleges a violation of the § 13(c) agreement and raises issues under the supremacy and contract clauses of the United States Constitution. Local 589's case is thus within this court's original federal question jurisdiction under 28 U.S.C. § 1331. *See Greater Portland*, *supra*.

If, when this case is remanded to the Supreme Judicial Court, the § 13(c) issues are determined prior to their determination in this court, that judgment will be a bar to subsequent determination of the same issues in this court, and the Union's right to a federal forum thus may be defeated.

The question then is whether this situation creates such a threat to the enforcement of federally guaranteed rights as to require a stay of state proceedings under 28 U.S.C. § 2283. I conclude that it does not. Nothing in the *Greater Portland* opinion suggests that the jurisdiction of the federal district court over § 13(c) litigation is exclusive. Nothing in this record suggests that the Supreme Judicial Court will fail to give the parties the full protection which the federal statutes and the Constitution provide. The Union's right to a federal forum is not absolute.[2]

The petition to remove is accordingly DISMISSED and the case remanded to the Supreme Judicial Court of the Commonwealth of Massachusetts.

/s/________________________
United States District Judge

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[2] *Cf. International Ass'n of Machinists* v. *United Aircraft Corp.*, 333 F.2d 367 (2d Cir. 1964), *cert. denied*, 379 U.S. 946.

COMMONWEALTH OF MASSACHUSETTS
SUFFOLK, SS. SUPREME JUDICIAL COURT
No. 79-388

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY
PLAINTIFF

v.

COMPLAINT

GEORGE P. ADAMS
JOHN J. O'LEARY
RICHARD J. GUINEY
ANTHONY B. ROMANO
RALPH W. NORMAN
RICHARD C. BRANSON
DONALD J. FARQUHARSON
JAMES J. SLATTERY
BERNARD CORBETT
DEFENDANTS
Individually and in their representative capacities

TO THE HONORABLE, THE JUSTICES OF THE SUPREME JUDICIAL COURT:

1. This proceeding is a Petition for Declaratory relief under the provisions of General Laws Chapter 231A.

2. The provisions of General Laws Chapter 150C relating to the validity and enforceability of collective bargaining agreements are not applicable to the Plaintiff.

3. — The Plaintiff, Massachusetts Bay Transportation Authority is a body politic and corporate and a political subdivision of the Commonwealth of Massachusetts under the provisions of General Laws Chapter 161A, Section 2, and has its principal place of business in the City of Boston, County of Suffolk, Commonwealth of Massachusetts.

4. The Defendants are:

George P. Adams, Vice President, Acting President and Acting Business Manager, 195 Union Street, South Weymouth, within the County of Norfolk;

John J. O'Leary, Financial Secretary-Treasurer, 6 Presentation Road, Brighton, within the County of Suffolk;

Richard J. Guiney, Recording Secretary, 215 South Street, Avon, within the County of Essex;

Anthony B. Romano, Assistant Secretary, 52 Lincoln Street, Revere, within the County of Suffolk;

Ralph W. Norman, Executive Board Member, 56 Oak Hill Road, East Weymouth, within the County of Norfolk;

Richard C. Branson, Executive Board Member, 66 Collincotte Street, Stoneham, within the County of Middlesex;

Donald J. Farquharson, Executive Board Member, 17 Roslin Street, Dorchester, within the County of Suffolk;

James J. Slattery, Executive Board Member, 123 Hanian Drive, Weymouth, within the County of Norfolk;

Bernard Corbett, Executive Board Member, 142 Marine Road, South Boston, within the County of Suffolk

and are all members of the Boston Carmen's Union, Division 589, Amalgamated Transit Union, AFL-CIO-CLC; a voluntary unincorporated Association; the officers and Executive Board of which are authorized to enter into collective bargaining agreements with your Plaintiff in behalf of the members of said Amalgamated Transit Union, Division 589.

5. The above-named members of the aforesaid Amalgamated Transit Union, Division 589, are sued herein individually and in the representative capacities. All the members of said Amalgamated Transit Union, Division 589, have not been made defendants since by reason of the fact that there are approximately forty-five hundred (4500) members in

number and it would be impracticable to bring them all before the Court, but the suit is of common and general interest to each and all members of said Division 589, and any one or more of the individual Defendants named in this Complaint will insure adequate representation of all members of said Division 589.

6. All of the aforesaid persons are joined in one action as defendants because there is asserted against them jointly and severally rights to relief arising out of the same transaction, occurrence or series of transactions and as such should be considered and construed as a class action involving all of the membership of Local 589.

7. The Plaintiff, M.B.T.A., is a recipient of federal funds obtained through grants issued to the Plaintiff by the United States Department of Transportation through its Urban Mass Transportation Administration under provisions of the Urban Mass Transit Act of 1964, as from time to time amended. (49 U.S.C.A. Section 1601 et seq.) Section 13(c) of said Urban Mass Transit Act (49 U.S.C.A. Section 1609(c)) provides that it be a condition of assistance under the Act that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. A copy of said Section 13(c) is attached hereto as Attachment "A."

8. In administering the foregoing section, the Secretary of Labor has made provisions whereby the rights of said employees are protected by means of an agreement entered into between the grantee of federal funds and labor organizations representing employees affected thereby.

9. In pursuance of the foregoing policy the Plaintiff, M.B.T.A., entered an agreement with the Defendant, Local 589, dated December 10, 1974, a copy of which is annexed hereto as Attachment "B."

10. The Agreement contained in Attachment "B", attached hereto, has been accepted by the Secretary of Labor satisfying the requirements of Section 13(c).

11. Federal grants made to the M.B.T.A. as alleged in paragraph 7 have been made predicated upon the Agreement set forth in Attachment "B."

12. By the provisions of Section 4 of Attachment "B", it is provided that collective bargaining rights of the M.B.T.A.'s employees represented by the Defendant shall be maintained to the extent that such rights are provided for by applicable laws and/or existing collective bargaining agreements or otherwise.

13. At the time the Agreement, Attachment "B", was executed, the collective bargaining rights of the employees represented by the Defendant were governed by the provisions of Massachusetts General Laws Chapter 161A, Section 19, (Attachment "C").

14. The collective bargaining agreement between the Plaintiff and the Defendants in effect in 1974 when the 13(c) agreement was executed contained in Section 103 language relating to arbitration, which is set forth in Attachment "D."

15. The collective bargaining agreement in effect in 1974 related to the period from January 1, 1973 to December 31, 1975. An Arbitration Award dated May 19, 1976, extended the collective bargaining agreement containing the aforesaid arbitration provisions.

16. The Arbitration Award of May 19, 1976 provided as follows in Section 1 of said award:

> "The term of the Agreement to replace the preceding Agreement shall be for two years, effective January 1, 1976 to December 31, 1977."

17. In 1978 the Legislature of the Commonwealth of Massachusetts enacted Chapter 405 of the Acts of 1978 which amended said Section 19 of Chapter 161A, by setting forth provisions applicable to certain arbitration procedures. A copy of Chapter 405 is attached hereto as Attachment "E."

18. A controversy has arisen between the Plaintiff and the Defendants as to the effect of said Chapter 405 of the Acts of 1978 as it may affect the "13(c) Agreement" as set forth in Attachment "B."

19. The Defendants invoked the provisions of Section 13(a)(1) of Attachment "B" seeking to have the controversy arbitrated.

20. Subject to objection and reservation of rights by the Plaintiff, the matter was arbitrated. An Award was issued by the Arbitrator dated August 13, 1979, a copy of which is attached hereto as Attachment "F."

21. The foregoing Arbitration Award provided that:

> "The July 10, 1978 amendments to Section 19 of Chapter 161A of the General Laws, and the M.B.T.A.'s insistence on arbitrating interest disputes pursuant to those amendments, constitutes a conflict with the pre-existing 13(C) Agreements executed by the parties."

22. The Plaintiff requests that the Court make a binding declaration of the right, duty and status as follows:

> a. The provisions of Chapter 405 of the Acts of 1978 are not inconsistent with the 13(c) Agreement set forth in Attachment "B."
>
> b. The provisions of Section 4 of the 13(c) Agreement set forth in Attachment "B" preserving collective bargaining rights of the Defendant are not violated by Chapter 405 of the Acts of 1978.

c. Employees represented by the Defendant Union are required to comply with the provisions of Chapter 405 of the Acts of 1978.

d. In issuing the award contained in Attachment "F", the Arbitrator exceeded the powers given to him under the provisions of Section 13(b) of the 13(c) Agreement set forth in Attachment "B".

e. The Award of the Arbitrator set forth in Attachment "F" constitutes an unauthorized interpretation of a statute of the Commonwealth of Massachusetts.

f. The Award of the Arbitrator as set forth in Attachment "F" should be vacated.

g. For such other declarations as the Court may deem appropriate in the circumstances.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY

By its attorneys,

/s/ ______________________________
Joseph H. Elcock, General Counsel
50 High Street, Boston, MA 02110
722-3156

/s/ ______________________________
Joseph A. Emerson, Special Counsel
One Boston Place, Boston, MA 02108
542-6666

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY ADVISORY BOARD & others *vs.* MASSACHUSETTS BAY TRANSPORTATION AUTHORITY & others.

Suffolk. November 22, 1980. — February 12, 1981.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, WILKINS, & LIACOS, JJ.

Massachusetts Bay Transportation Authority, Budget, Advisory board, Federal assistance. *Governor. Statute*, Construction. *Constitutional Law*, Expenditure of money, Separation of powers of government. *Practice, Civil*, Deferral of judicial remedy.

A judge of the Superior Court had no authority under G. L. c. 231A, § 3, to make a "preliminary declaration" of rights as to the validity of an executive order issued by the Governor [ ]; however, where the validity of the order was fully argued on the merits before this court and did not depend on any disputed matters of fact, this court treated the plaintiffs' request for a prompt declaration of rights as a motion for partial summary judgment in order to avoid rendering a decision that was merely tentative. [ ]

The provisions of G. L. c. 161A, § 29, authorizing and directing the Massachusetts Bay Transportation Authority "to take all necessary action to secure any federal assistance" do not override c. 161A, § 5 (*i*), which prohibits the authority from making expenditures in excess of its budget. [ ]

The Governor was not authorized by G. L. c. 161A, § 20, by St. 1950, c. 639, as amended, or by executive powers inherent in his office to suspend by executive order the operation of G. L. c. 161A, § 5(*i*), or to take possession of the lines and facilities of the Massachusetts Bay Transportation Authority because of an anticipated interruption of public transportation resulting from a budget dispute [ ]; in the circumstances, however, this court permitted the Governor to continue to operate the authority under executive order for the brief period necessary to convene the Legislature and to give the Legislature an opportunity to consider what action it deemed appropriate. [ ]

CIVIL ACTION commenced in the Superior Court Department on October 31, 1980.

After hearing before *Young*, J., the case was transferred to the Supreme Judicial Court for the county of Suffolk by *Abrams*, J., and was reserved and reported by her.

Stephen S. Ostrach, Assistant Attorney General (*Donald K. Stern & William L. Pardee*, Assistant Attorneys General, with him) for the Governor & another.

Joseph H. Elcock (*Ronald G. Busconi* with him) for the Massachusetts Bay Transportation Authority & others.

Herbert P. Gleason (*Thomas H. Martin & John F. Maher* with him) for the Massachusetts Bay Transportation Authority Advisory Board.

BRAUCHER, J. On November 18, 1980, the Governor of the Commonwealth issued Executive Order 189, proclaiming the existence of an emergency, taking possession of the lines and facilities of the Massachusetts Bay Transportation Authority (MBTA), and authorizing the Board of Directors of the MBTA to operate those lines and facilities. The present case was argued before the full court on November 22, 1980, and on November 28, 1980, we ordered the entry of a partial summary judgment declaring that "(1) Executive Order 189, except as stated below, is beyond the powers granted to the Governor and is of no force or effect. (2) Pursuant to Executive Order 189, the MBTA may continue to operate until 12:00 P.M. on Friday, December 5, 1980." Two Justices saw no justification for authorizing the continued operation of the MBTA beyond 12:00 P.M. on Tuesday, December 2, 1980, since "the Legislature, on its convening, promptly may pass legislation authorizing the continued operation of the MBTA, while the Legislature deliberates on other matters concerning the MBTA." We said that an opinion or opinions would follow, and we now issue our opinion.

1. *The proceedings.* On October 31, 1980, the MBTA Advisory Board filed in the Superior Court a complaint against the MBTA, its Board of Directors and Treasurer-Controller, and Barry M. Locke, and the Treasurer and Receiver General of the Commonwealth, seeking declaratory and injunctive relief. On November 10, 1980, a judge of

that court issued a preliminary injunction against the defendants other than the Treasurer and Receiver General. Those defendants were enjoined from (1) certifying or charging to the Treasurer and Receiver General any sums attributable to the MBTA net cost of service which derived from expenditures in excess of $302,130,152, and (2) expending or authorizing expenditures attributable to MBTA operations during the calendar year 1980 in excess of $302,130,152. Part (2) of the injunction was stayed until 12:00 P.M., Sunday, November 30, 1980. The order was affirmed by a single justice of the Appeals Court and by a single justice of this court.

The amount of the budget for calendar year 1980, approved by the Advisory Board pursuant to G. L. c. 161A, § 5 (*i*), was $302,130,562,[1] and it was estimated that at its current rate of expenditure the MBTA would exceed that amount on Wednesday, November 12, 1980. On November 16, the Advisory Board met and voted not to approve any supplementary budget; on November 17 the General Court met in special session to consider MBTA questions, but took no action. On Tuesday, November 18, the Governor issued Executive Order 189, which limited MBTA expenditures to "$41,000,000 over the currently approved budget." On November 19 the Advisory Board filed an amended complaint, adding twenty-seven individual taxpayers as plaintiffs and adding the Governor as a defendant.

On Friday, November 21, 1980, after hearing, the judge dictated a "memorandum of decision." He declared that the injunction previously issued would remain in effect but would not apply to the defendants acting as "agents of the Commonwealth under the authority of the Governor." He denied further injunctive relief, but made "a preliminary declaration of the rights of the parties," that "it is reasonably likely that, upon the trial of this matter, it will be declared that: 1. Executive Order 189 is unlawful as being beyond the powers granted to the Governor and is, therefore, of no force and effect. 2. Neither agents of the Commonwealth nor of the MBTA have any present power to incur obligations on behalf of the MBTA beyond its authorized budget or on behalf of the Commonwealth for the account of the MBTA beyond its authorized budget. 3. Any such obligations incurred in excess of monies appropriated therefor appear to impose the risk that . . . there may well be no liability on the Commonwealth pursuant to General Laws, Chapter 29, Section 26."

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[1] The discrepancy of $410 is not explained.

At the suggestion of the judge, a single justice of this court issues an order the same day transferring the case to the county court pursuant to G. L. c. 211, § 4A, for preparation of the record on the MBTA's appeal to the full court from the order of November 21, 1980. By a separate order the single justice reserved and reported that order without decision for argument before the full court on Saturday, November 22, 1980. On that day, after argument, a majority of the full court ordered that the "preliminary declaration" entered in the Superior Court on November 21 be vacated.

On November 28, 1980, the full court issued its order for partial summary judgment, to be entered in the Supreme Judicial Court for Suffolk County.[8]

2. *The facts.* On the basis of the verified complaints, supporting affidavits, and representations of counsel, the judge found that there was a reasonable likelihood that the Advisory Board could establish the following facts at trial, and those facts were not disputed in argument before us. The Advisory Board originally approved an MBTA budget of $302,130,562 for the calendar year 1980. After negotiations over a period of several weeks, the MBTA on August 19, 1980, requested a supplemental budget of $41,000,000. The executive committee of the Advisory Board voted on September 3, 1980, not to increase the

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[8] Subsequent to our order, the Legislature met in special session. The MBTA ceased to operate after Friday, December 5, 1980, but on December 7, 1980, the Legislature authorized the MBTA Board of Directors to restore budget reductions but not to exceed the total sum of $343,166,846. St. 1980, c. 581, § 18. Operations were promptly resumed.

budget, and the executive director of the Advisory Board sent a letter to the Governor and the MBTA on September 5, 1980, giving notice of that action. On September 15, 1980, the Advisory Board met and confirmed the action of its executive committee. The judge ruled that the September 5 letter satisfied the notice requirement of G. L. c. 161A, § 7, and that ruling was not contested before us.

Early in November, the MBTA had overspent some line items in the approved budget, and it would exceed the aggregate amount authorized on November 12. The annual deficit of the MBTA, defined as the "net cost of service" in G. L. c. 161A, § 1, is certified to the Treasurer and Receiver General. G. L. c. 161A, § 12. He subtracts State and Federal assistance payments and assesses the balance on the seventy-nine cities and towns in the MBTA district in accordance with formulas set out in G. L. c. 161A, §§ 8-11. Realistically, the judge said, there would be no hope that the cities and towns could recover funds illegally spent by the MBTA and assessed on them. Thus the Advisory Board and its constituent cities and towns would be irreparably injured if the MBTA spent funds beyond those authorized.

On November 18, 1980, there was an imminent risk of a slowdown, interruption or stoppage of service of the MBTA. Such an event, as the Executive Order recited, would cause the highways of the Commonwealth in the areas of metropolitan Boston to become so clogged with traffic during a substantial part of the day that the passage of fire fighting equipment, police, ambulances, vehicles used for the transportation of food and other essential vehicles would be impeded, thus endangering the health, safety and property of the citizens of the Commonwealth by increasing the likelihood of damage to property and loss of life because of fire and by creating serious shortages of foods. These events threatened the availability of essential services of transportation to such an extent as to endanger the health, safety and welfare of the community.

3. *Jurisdiction*. In the Superior Court the plaintiffs argued that the validity of Executive Order 189 was subject to

judicial review. The Governor and the Treasurer and Receiver General (the State defendants) resisted both injunctive and declaratory relief on a variety of grounds, including an argument that the Governor is not a proper party to this action, citing *Rice* v. *The Governor*, 207 Mass. 577, 579 (1911), and G. L. c. 231A, § 2, as amended by St. 1974, c. 630, § 1. No injunctive relief was granted with respect to the Executive Order, but after the case was transferred to this court the State defendants moved to vacate the "preliminary declaration" entered in the Superior Court, "since the practical effect of that declaration is that the Massachusetts Bay Transportation Authority may cease operations as early as Monday, November 24, 1980." Immediately after argument, a majority of this court ordered that the "preliminary declaration" be vacated, emphasizing that no view was expressed as to the correctness of the rulings of the Superior Court. We now add that we find no authority for such a "preliminary declaration." Under G. L. c. 231A, § 3, as amended by St. 1974, c. 630, § 2, it is a sufficient reason for denying declaratory relief that the declaration "if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings."

After argument the plaintiffs submitted a memorandum asserting that relief was being "sought, anomalously, by the parties who prevailed in the Superior Court," and that there was confusion "as to what, exactly, was before the Court." The memorandum stated that the plaintifs would treat any matter comprehended by the order of November 21, 1980, as susceptible to consideration by this court. The State defendants took the same view, and the validity of Executive Order 189 was fully argued on the merits. We considered the case on that basis, and did not address any jurisdictional issue.

We noted that the questions of the validity and effect of Executive Order 189 did not depend on any disputed matters of fact, and that identical questions with respect to the validity and effect of Executive Order 172, issued December 18, 1979, had been fully briefed and argued by some of the same parties and by the same leading counsel in November, 1980. To avoid rendering a decision that was merely tentative, we treated the request of the plaintiffs for a prompt declaration of rights as a motion for partial summary judgment, and allowed the motion. Mass. R. Civ. P. 56 (a), 365 Mass. 824 (1974).

4. *Federal requirements.* The MBTA statute, G. L. c. 161A, provided in § 5 (*i*), as amended by St. 1975, c. 205: "All current expenses of the authority shall be in accordance with an itemized budget. . . . The budget shall govern the current expenses of the authority during such calendar year. No such expenses may be incurred in excess of those shown in the budget, . . ." See *Boston* v. *Massachusetts Bay Transp. Auth.*, 373 Mass. 819, 823-824 (1977); *Massachusetts Bay Transp. Auth.* v. *Boston Safe Deposit & Trust Co.*, 348 Mass. 538, 543-546 (1965). The MBTA argued that those provisions were overridden by § 29, added by St. 1964, c. 563, § 18, which "authorized and directed" the MBTA and other State agencies "to take all necessary action to secure any federal assistance which is or may become available to the commonwealth or any of its subdivisions for any of the purposes of this chapter. . . . It is the intent of this section that the provisions of any federal law, administrative regulation or practice governing federal assistance for the purposes of this chapter shall, to the extent necessary to enable the commonwealth or its subdivisions to receive such assistance and not constitutionally prohibited, override any inconsistent provisions of this chapter."

The judge, in issuing a preliminary injunction on November 10, 1980, rejected that argument, and that action was not reported to this court. In his "memorandum of decision" of November 21, 1980, he did not discuss the issue, and it did not affect the "preliminary declaration" he then made. The MBTA argued to us, nevertheless, that the issue was before us, since the November 21 memorandum continued in effect the November 10 injunction. The State defendants did not address the issue, and it did not affect our decision. But we have no doubt that the judge correctly rejected the MBTA argument, and we now state our reasons.

As the judge recognized, the MBTA is the recipient of significant Federal assistance pursuant to the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 et seq. (1976). Under the provisions of the Federal grants, the Commonwealth was required to maintain a level of effort and expenditure not less than the average of the funds expended on mass transit during the previous two fiscal years. 49 U.S.C. § 1604 (f). The MBTA budget complied. But the MBTA also gave assurances that it would "provide for the continued or improved operation of the system," and the operating grant contracts provided for reductions in Federal assistance in the event State and local funding or service levels were reduced.

Thus a reduction or cessation of service would jeopardize Federal funding for the MBTA. Nevertheless, we agree with the judge that G. L. c. 161A, § 29, did not authorize expenditures in excess of budget and thus contrary to G. L. c. 161A, § 5 (*i*). A contrary conclusion would render the budget review responsibility of the Advisory Board a nullity and would trespass on the exclusive legislative power to appropriate money. The effect of the budget on prospects of Federal assistance was a matter to be considered by the Advisory Board, but the Federal statute, regulations and contracts could not authorize expenditure of State funds contrary to § 5 (*i*). See *Opinion of the Justices*, 302 Mass. 605, 614 (1939); *Opinion of the Justices*, 294 Mass. 616, 621 (1936).

5. *Seizure under the MBTA statute.* The State defendants argued that the Governor's action was authorized by G. L. c. 161A, § 20.[3] The plaintiffs responded that that

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[3] As inserted by St. 1964, c. 563, § 18: "Notwithstanding any contrary provision of law, whenever there exists a continued interruption, stoppage or slowdown of transportation of passengers on any vehicle or line of the authority or a strike causing the same, and which is in violation of an injunction, a temporary injunction, a restraining order, or other order of a court of competent jurisdiction, and which threatens the availability of essential services of transportation to such an extent as to endanger the health, safety or welfare of the community, the governor may declare that

section is limited to cases of labor disputes. The judge rejected the plaintiffs' argument, in accordance with the plain meaning of the statutory language, which covers "a continued interruption . . . *or* a strike causing the same" (emphasis supplied). He ruled that the language of the statute "encompasses the possibility of riot, severe vandalism, and the like." But, he ruled, the comma preceding the first "and which" clause made it clear that both "and which" clauses were applicable both to a "strike" and to any other "continued interruption." Hence, he ruled, the section applies only if the interruption, stoppage and slowdown is in violation of a court order. Since there was no such court order, the statute did not apply.

We agree with the judge's conclusion, though not with the stress he placed on the comma. A strictly grammatical reading, comma or no comma, would treat the two "and which" clauses as parallel to the preceding phrase, "causing the same." All three parallel modifiers would then modify only "strike," not "interruption, stoppage or slowdown." So read, however, the sentence seems peculiar, since the second "and which" clause, defining the threat that creates the emergency, ties into the following sentence and seems properly applicable to any covered case. Any ambiguity is resolved by the legislative history. As proposed by the Governor, the section bore the caption "Interruption, Stoppage or Slowdown of Transportation Service in Violation of Injunction: Emergency Powers of Governor." 1964 Senate Doc. No. 830. 1964 House Doc. No. 3646. All section captions were deleted from the statute as enacted, but the text

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an emergency exists. During such emergency he may take possession of, and operate in whole or in part, the lines and facilities of the authority in order to safeguard the public health, safety and welfare. Such power and authority may be exercised through any department or agency of the commonwealth or through any person or persons and with the assistance of such public or private instrumentalities as may be designated by him. Such lines and facilities shall be operated for the account of the authority. The powers hereby granted to the governor shall expire forty-five days after his proclamation that a state of emergency exists."

of § 20 was not changed. Thus we conclude, as did the judge, that the section has no application unless there is a violation of a court order.

6. *The civil defense statute.* Executive Order 189 also invoked St. 1950, c. 639, as amended (the civil defense statute). The recitals in the Executive Order follow the language of a clause added by St. 1958, c. 425, § 1: "whenever because of absence of rainfall or other cause a condition exists in all or any part of the commonwealth whereby it may reasonably be anticipated that the health, safety or property of the citizens thereof will be endangered because of fire or shortage of water or food"; the Governor may proclaim an emergency. The 1958 amendment bore the title "An Act authorizing the governor to deal with the threat of danger by drought." We do not think the Legislature intended to cover such an "other cause" as a budget dispute leading to an interruption of public transportation.

7. *The Governor's inherent powers.* Finally, Executive Order 189 invoked "any other powers vested in me [the Governor] under the Constitution of the Commonwealth, or otherwise." The Governor is the "supreme executive magistrate" of the Commonwealth. Part II, c. 2, § 1, art. 1, of the Constitution of the Commonwealth. See *Opinion of the Justices*, 375 Mass. 827, 833 (1978). We have recognized the existence of executive powers inherent in the office of Governor. See *Opinion of the Justices*, 368 Mass. 866, 875 (1975). The State defendants contended that Executive Order 189 was a proper exercise of such a power.

That contention fails. "The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for." Art. 20 of the Declaration of Rights of the Massachusetts Constitution. The Governor could not by executive order, in the absence of legislative authority, suspend the operation of G. L. c. 161A, § 5 (*i*). Nor could we. See *Commissioner of Pub. Health* v. *Bessie M. Burke Memorial Hosp.*, 366 Mass. 734, 741 (1975).

On the other hand, we recognize, as did the Superior Court judge, that the Governor was confronted by the prospect of a public disaster. The continued operation of the MBTA involved the expenditure of funds in violation of § 5 (*i*), and thus intruded upon the power of the Legislature to control expenditures. Unless expenditures were authorized by the Advisory Board, authority could be granted only by the Legislature with the approval of the Governor. But as a practical matter, notwithstanding violation of § 5 (*i*), funds would continue to be expended in order to shut down the operation of the MBTA in a manner consistent with the preservation of its immensely valuable rolling stock and other property. Resolution of the underlying political problems had no doubt been delayed by the legal uncertainties and the time needed, even with expedited proceedings, to obtain an authoritative decision. The Legislature was no longer in session, and it would need time to consider the alternatives.

In such circumstances deferral of coercive judicial remedies to permit action by the appropriate branch of government is a familiar expedient. See, e.g., *Hallenborg* v. *Town Clerk of Billerica*, 360 Mass. 513, 519-520 (1971). In *Reynolds*, v. *Sims*, 377 U.S. 533, 585-587 (1964), the Supreme Court of the United States approved the action of a lower court in ordering into effect an invalid plan for legislative apportionment as a temporary and provisional measure, in order to give the responsible State legislature an opportunity to remedy constitutional deficiencies. Accordingly, we expressed the view that "the Governor must have power to continue the operation [of the MBTA] for the period necessary to convene the Legislature and for consideration of such action as it deems necessary to authorize expenditures either to shut down or to continue the operation, and otherwise to regulate the operation of the MBTA."

We were in agreement that the Governor's power to continue MBTA operations would cease when the necessity ceased, and two Justices thought it would cease at 12:00 P.M. on Tuesday, December 2, 1980. In the opinion of a majority of the court, however, the Legislature would need until 12:00 P.M. on Friday, December 5, 1980, for its deliberations, and our judgment permitted operation until the later time.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 45919

JOHN J. GALLAHUE, JR., et al.

v.

MASSACHUSETTS BAY AUTHORITY

FURTHER ORDER ON THE REQUEST OF THE PLAINTIFFS FOR A PRELIMINARY INJUNCTION

After a careful review of the actual contracts between the Massachusetts Bay Transportation Authority and each of the unions representing the individually named plaintiffs herein, and pursuant to the order of this Court entered on Wednesday, December 30, 1980, and upon further reflection, the Court concludes that the earlier order entered herein ought be modified and limited injunctive relief granted.

Now, therefore, in consideration of the affidavits and representations of the parties, and upon review of the existing contracts between the Massachusetts Bay Transportation Authority and the unions representing the individually named plaintiffs, it is ordered that:

a. provided that the plaintiffs amend their complaint to name as parties in interest the unions of which they are members and whose contractual rights they here seek to enforce; and
b. provided that Local 589, Amalgamated Transit Union (Carmens Local 589) posts a bond in the amount of $50,000, and each of the other plaintiff unions who shall

> obtain the benefits of preliminary injunctive relief shall post a bond in the amount of $25,000 to secure the Massachusetts Bay Transportation Authority against such damages as it may sustain should it be determined that this injunction has been entered improvidently.

Then the Massachusetts Bay Transportation Authority, its directors, officers, employees, agents, servants, and all persons of whatsoever name and nature who shall act in concert with it, shall be preliminarily enjoined from:

1. *Vacancies*. As to Local 6, Office and Professional Employees International Union (Clerical Local 6), Boston Lodge 264 of District No. 38, International Association of Machinists and Aerospace Workers (Machinists Local 264), Carmens Local 589, the Building and Construction Trades Council of the Metropolitan District (Construction Tradesmen), and the Massachusetts Bay Transportation Authority Police Association (Police) failing to advertise permanent vacancies (other than vacancies caused by a reduction in force) in accordance with the contracts between the several unions named and the M.B.T.A. and then, should the Secretary of Administration and Finance permit such vacancy to be filled in accordance with St. 1980, c. 581, § 23, from filling such vacancies save in accordance with the seniority provisions of the respective union contracts;[1]

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[1] The contracts of the M.B.T.A. with each of the named unions contain language which clearly expresses the intent of the parties that the provisions of the contract continue — at least for some period — while a new contract is being negotiated. Certain of the contracts contain language to the effect that — following a request for change in the contract terms and the expiration of a stated period (generally sixty days) — the contract will be "opened up." The Court interprets this language to mean that contract provisions previ-

2. *Cover Lists.* As to Clerical Local 6 and Boston Lodge No. 384, Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (Tower Men Lodge 384), from assigning members of these two unions to "cover lists", so-called, or active or inactive reserve status without complying with the seniority provisions contained in Article XXV of the contract between the M.B.T.A. and Clerical Local 6, or the seniority provisions of Article XIX of the contract between the M.B.T.A. and Tower Men Lodge 384, respectively, and as to Carmens Local 589 and the M.B.T.A. Police, from failing to recall members of those unions to specifically assigned duties from "cover lists", so-called, in any other order than the seniority established by the respective contracts with those unions;

3. *Overtime.* No injunctive relief granted;[2]

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ously in effect shall come to an end and the entire contract shall be renegotiated. The remaining contracts contain language implying that the prior contract provisions remain in effect until a new contract is renegotiated. For injunctive purposes, this Court concludes that it is unreasonable to interpret these provisions so as to continue the prior provisions forever. Such an interpretation would give undue bargaining power to one of the parties who could avoid any renegotiation simply by standing on the provisions of the prior contract. Accordingly, for purposes of granting injunctive relief, this Court shall set a six month period to injunctive relief granted on the basis of such contracts since this seems a reasonable time within which the parties may renegotiate them.

[2] The public interest in safe operation of the M.B.T.A. cuts against injunctive relief to require allowing personnel to return to duty after only six hours' rest notwithstanding the provisions of the applicable contract with Carmens Local 589. Moreover, an adequate remedy at law may well be fashioned. Pursuant to Mass.R.Civ.P. 16, the M.B.T.A. and Carmens Local 589 are directed to agree forthwith upon a procedure for identifying those individuals who, in the absence of Special Order No. 80-106, would have opted for overtime runs with available rest time of less than eight hours between runs. A running calculation is to be maintained by the parties concerning

4. *Guards*. As to Carmen Local 589, from failing to post less than one guard for each two cars on trains of two cars or more;[3]

5. *Subcontracting*. No injunctive relief granted;[4]

6. *Part-time Employees*. From hiring part-time employees to perform work ordinarily performed by Carmens Local 589, save in accordance with paragraph 124 of the contract between the M.B.T.A. and that union from hiring part-time employees to perform work normally performed by the members of Clerical Local 6, save in accordance with Article III(a) of the contract between the M.B.T.A. and that union, from hiring part-time employees to perform work normally performed by the members of Local 717, International Brotherhood of Electrical Workers, save in accordance with Article XXV of the contract between the M.B.T.A. and that union, from hiring part-time employees to perform work normally

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the names and amounts of overtime which would have been earned by such individuals in the absence of Special Order No. 80-106. Should the parties fail to agree upon such a procedure, a further hearing may be ordered to require the establishment of an escrow fund for the payment of such claims should Carmens Local 589 succeed upon this point.

[3] While St. 1980 c. 581, § 1 repealed G.L. c. 161, § 91A and thereby extinguished the penalty imposed upon the M.B.T.A. should it fail to assign a guard to each two cars of passenger trains consisting of more than one car, the legislative action cannot be read as extinguishing what all parties were entitled to rely upon as a past practice since 1935. Moreover, in this instance, the public safety, as well as the safety of the members of Carmens Local 589, cuts in favor of limited injunctive relief.

[4] Certain of the contracts prohibit subcontracting the work of the unions involved to others. Injunctive relief does not seem warranted to prevent this practice despite a showing of reasonable likelihood of success since the damages to the union from the alleged imminent breach of contract, while perhaps difficult of calculation, are far from impossible to ascertain. Accordingly an adequate remedy at law in money damages exists.

performed by members of Machinists Local 264, save in accordance with Article XIV-B of the contract between the M.B.T.A. and that union, and from hiring part-time employees to perform work normally performed by the members of the Construction Tradesmen, save in accordance with Articles XVI and XXIII of the contract between the M.B.T.A. and that union.

As to the M.B.T.A. and the members of the Construction Tradesmen, this injunction shall remain in full force and effect until further order of this Court or until final judgment in this case, or until the passing of six months after the expiration date of the contract between the Building Trades Council and the M.B.T.A., whichever shall first occur. As to Electrical Workers Locals 104 and 717, and Machinists Local 264, this injunction shall remain in full force and effect until further order of this Court, until final judgment in this case, until the completion of grievance, mediation, and arbitration procedures as provided for in the respective contracts with the unions named, until the renegotiation of a new contract, or until Monday, March 2, 1981, whichever shall first occur. As to the M.B.T.A. and the members of the remaining unions named above, this injunction shall remain in full force and effect until further order of this Court, until the entry of final judgment in this action, until the completion of grievance, mediation, and arbitration procedures called for in the contracts between the M.B.T.A. and the respective unions, until the renegotiation of a new contract with the respective union, or until Friday, July 3, 1981, whichever shall first occur.

It is so ORDERED.

By the Court.

/s/__________________________
William G. Young
Justice of the Superior Court

Dated: January 7, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LOCAL 589, AMALGAMATED TRANSIT
UNION, AFL-CIO,
Plaintiff,

BOSTON LODGE 264, DISTRICT 38, C.A. No. 79-2058-S
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO,
Intervening Plaintiff,

v.

COMMONWEALTH OF
MASSACHUSETTS, et al.,
Defendants

AFFIDAVIT OF PAUL J. MURPHY

Paul J. Murphy, being duly sworn, states as follows:

1. My name is Paul J. Murphy and I reside at 15 Country Club Road, Melrose, Massachusetts. I am employed by the MBTA as the Director of Labor Relations and Personnel Administration.

2. Although the Intervening Plaintiff, Lodge 264, District 38, International Association of Machinists and Aerospace Workers, AFL-CIO, is the collective bargaining representative for machinists, automotive machinists, machinist repairmen and machinist specialists employed by the MBTA, not all the members of Lodge 264 are employees of the MBTA.

3. Upon information and belief, some of the members of Lodge 264 are employees of the Boston and Maine Railroad which operates commuter rail service for the MBTA.

4. The International Association of Machinists and Aerospace Workers, represented by William J. Hickey, Attorney and Authorized Agent, as they are members of the Railway Labor Executives Association, is an organization representing Boston and Maine employees and not MBTA employees, and as such, has signed the 13(c) Agreement.

5. Lodge 264, District 38, is not now and has never been signatory to the 13(c) Agreement. Lodge 264 was so notified by letter dated November 3, 1980 by Joseph A. Emerson, Special Counsel for the MBTA, on 13(c) matters, attached hereto as Exhibit 1.

6. Lodge 264 in the nearly three years since Chapter 405 of the Acts of 1978 has never sought arbitration of their allegation that Chapter 405 of the Acts of 1978 violates any 13(c) Agreement between said Lodge 264 and the MBTA.

7. The parties have been attempting to negotiate a new collective bargaining Agreement since notice was given by Lodge 264 on October 19, 1977 and by the Authority on October 26, 1977. See *Affidavit of Paul J. Murphy* filed on March 12, 1981, marked "B".

8. By letter dated July 2, 1980, Richard X. Goggin of the Federal Mediation and Conciliation Service declared impasse on negotiations between the parties. Said letter is attached hereto as Exhibit 2.

9. By letter dated July 30, 1980, the Authority notified Lodge 264 that it sought interest arbitration in accordance with C. 161A, Section 19 et seq. of the General Laws.

10. On August 20, 1980 the attorney for Lodge 264 stated that interest arbitration under C. 161A, Section 19 et seq. could not be held.

11. On November 26, 1980 the MBTA notified the Commonwealth of Massachusetts Board of Conciliation and Arbitration that the parties had failed to select a single neutral arbitrator and, in accordance with C. 161A, Section 19 et seq. asked the Board to request a list of arbitrators with the requisite qualifications.

12. On December 2, 1980 Lodge 264 requested that the Massachusets Board of Conciliation and Arbitration not process the MBTA's request for interest arbitration.

13. The cost of living adjustment allegedly due Lodge 264 as of December 6, 1981 was not paid by the MBTA.

14. On December 29, 1980 the American Arbitration Association forwarded a list of arbitrators in accordance with Chapter 161A, § 19 et seq.

15. On January 2, 1981 the MBTA requested a meeting with Lodge 264 to select a single neutral arbitrator within ten days.

16. On January 15, 1981 the MBTA notified the Board of Conciliation and Arbitration that Lodge 264 refused to strike names and forwarded to the Board the list of the remaining three names with preference.

17. On January 30, 1981 Lodge 264 requested that the Massachusetts Board of Conciliation and Arbitration hold the arbitrator selection process in abeyance.

18. On February 20, 1981 the MBTA notified Lodge 264 and the Federal Mediation and Arbitration Service that since Lodge 264 had broken off contract negotiations, the MBTA had no duty to pay a cost of living increase to Lodge 264 employees and further declined arbitration of that dispute.

19. On March 4, 1981 Lodge 264 requested that the Board of Conciliation and Arbitration hold the interest arbitration process in abeyance.

20. On March 25, 1981 the MBTA requested that the Board of Conciliation and Arbitration choose an arbitrator from the

remaining three names on the aforementioned American Arbitration Association list of arbitrators to serve as the third neutral arbitrator in accordance with the opinion of this court dated March 17, 1981.

21. On April 2, 1981 Lodge 264 informed the Board that it was willing to meet to informally discuss the case.

22. On April 10, 1981 Lodge 264 informed the Board that it would engage in the process while reserving its rights to object to the list of arbitrators.

PAUL J. MURPHY
Director of Labor Relations and
Personnel Administration

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. April 29, 1981

Paul J. Murphy appeared before me and swore that the facts in the foregoing affidavit are true to the best of his personal knowledge and belief.

RONALD G. BUSCONI, Notary Public
My Commission Expires: March 16, 1984

Exhibit 1.

MORGAN, BROWN, KEARNS & JOY
ATTORNEYS AT LAW
ONE BOSTON PLACE
BOSTON, MASSACHUSETTS 02108
(617) 542-6666

November 3, 1980

Michael A. Feinberg, Esquire
Flamm, Kaplan, Paven & Feinberg
50 Congress Street
Boston, MA 02109

Dear Attorney Feinberg:

Mr. Paul J. Murphy, Director of Labor Relations & Personnel Administration of the MBTA, has forwarded to me copies of correspondence exchanged between you and him relative to Lodge 264.

It is the position of the Authority that in the event an impasse is reached in the negotiations between it and Lodge 264, the matter must be advanced for resolution in accordance with Chapter 161 A Section D.

A review of the existing so-called "13(c) Agreements" do not indicate that Lodge 264 is a signotary. Since it is not a party to the 13(c) Agreement", the provisions thereof are not available to Lodge 264.

I have advised Mr. Murphy to proceed as he suggested to Mr. Mastrondea in his letter of July 30, 1980.

Very truly yours,

Joseph A. Emerson

emr
cc: Paul J. Murphy, Director of Personnel
11/4 — cc: J.F.L., R.F.K.

Exhibit 2.

FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
100 Summer Street
Boston, Massachusetts 02110

July 2, 1980

Mr. James Lomans, Director Industrial Relations
Massachusetts Bay Transportation Authority
45 High Street
Boston, Massachusetts 02110

Mr. Anthony Mastandrea, Business Representative
International Association of Machinists
96 Chestnut Hill Avenue
Brighton, Massachusetts 02135

Re: Negotiations MBTA and I.A.M #264 AFL-CIO

Gentlemen:

Based on the meetings we have had and telephone conversations with each of you, it is my judgment that we have reached an impasse.

Sincerely Yours,

Richard X. Goggin

/mjf

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
No. 51214

MEMORANDUM OF OPINION DENYING RELIEF AND DISMISSING COMPLAINT

BOSTON LODGE 264 OF DISTRICT 38,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO,
PLAINTIFF

v.

MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
DEFENDANT

Plaintiff seeks an order from this Court requiring the defendant to join with the plaintiff in selecting an arbitrator and proceed to arbitration on the subject of cost-of-living adjustments due union members under a collective bargaining agreement entered into by the parties on January 1, 1976.

That contract was, by its terms, to continue until December 31, 1977, and from year to year thereafter unless notice of a desire to change or terminate the contract is served by one party or the other at least sixty (60) days before the next anniversary. A notice to change was so served by both parties in October of 1977. This notice cut off the "year to year" provision and the contract was terminated.

Plaintiff has, in this and in related suits, contested this legal conclusion and advanced the theory of a perpetual contract. Such theory has been rejected by Judge William Young. *Gallahue* v. *M.B.T.A.*, Mass. Superior Court, Suffolk County No. 45917, slip op. at n.1 (January 7, 1981). So did Judge Breyer of the First Circuit Court of Appeals. *Local Division 589 A.T.U.* v. *Commonwealth*, Nos. 80-1180, 81-1198 and 81-1219. So did Judge Walter Skinner of the District Court. 511 F.Supp. 312 (D. Mass. 1981).

However, Judge Skinner, relying on the principle of equitable estoppel ruled that the M.B.T.A. was estopped to deny the continued existence of the contract.

The Circuit Court reversed Judge Skinner and remanded the case to him to reconsider the propriety of his injunction.

The Circuit Court also rejected constitutional arguments that Chapter 405 of the Acts of 1978 and Chapter 581 of the Acts of 1980 impaired the obligation of existing contracts or conflicted with federal laws.

Defendant stopped paying cost-of-living salary adjustments in December 1980. It was, in fact, forbidden to do so by G.L. c. 161A, § 19 as amended and effective on December 8, 1980.

In conclusion, there is no contract now in effect. Even if there were, the defendant is barred from making cost-of-living payments.

Plaintiff's remedy is to file a grievance with the state Board of Conciliation and Arbitration. See G.L. c. 161A, § 19.

It is therefore ORDERED and ADJUDGED that the complaint be dismissed with prejudice and without costs.

Andrew G. Meyer
Justice of the Superior Court

Dated: November 10, 1981

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION
No. 51582

LOCAL DIVISION 589,
AMALGAMATED TRANSIT UNION,
A. F. L. - C. I. O.

vs.

THE MASSACHUSETTS BAY TRANSPORTATION
AUTHORITY

DECISION

This is a petition filed on November 10, 1981 by Local Division 589, Amalgamated Transit Union, A. F. L. - C. I. O. for a declaratory relief seeking a declaration that Chapter 581 of the Acts of 1980 effects only future collective bargaining agreements and that the terms of the collective bargaining agreement, entitled Memorandum of Understanding dated August 8, 1979 are still in effect by means of a "roll-over" provision contained therein. Both parties agreed that Chapter 405 of the Acts of 1978 and Chapter 581 of the Acts of 1980 will govern future negotiations and agreements.

This is the fourth of five court actions involving the parties surrounding these two acts.

The first was a petition for declaratory relief filed September 10, 1979 in the Supreme Judicial Court by the MBTA.

This raises the question, *inter alia*, whether enactments of the Legislature can change the terms of an existing collective bargaining agreement in view of a section 13(c) agreement, Urban Mass. Transportation Act, filed in behalf of the MBTA with the Secretary of Transportation. In this action, the Attorney General of the Commonwealth intervened due to the constitutional challenge to Chapter 405 of the Acts of 1978. This suit is still pending and bears the docket number 79-388 Civ.

The second action, filed December 24, 1980 in the Suffolk Superior Court, docket number 45919, is entitled *Gallahue et al. vs. Massachusetts Bay Transportation Authority*. In this action representatives of twenty-five local unions (including Local Division 589) seek to enjoin the MBTA from exercising the powers authorized or mandated by Chapter 581 of the Acts of 1980 as it is alleged said exercise is contrary to the terms of the present collective bargaining agreement as extended by the "roll-over" provision of said agreement, at least until a new collective bargaining agreement is reached. This action is still pending, but the Court, Young, J., ruled that, for the purposes of injunctive relief, the collective bargaining agreement, regardless of the "roll-over" provision, may as a matter of law have expired.

The third set of actions were commenced in the United States District Court for the District of Massachusetts seeking a declaration that both Chapter 405 and Chapter 581 are unconstitutional. The Circuit Court of Appeals for the First Circuit rendered an opinion on September 30, 1981, numbered 81-1180, 81-1198 and 81-1219. The ruling was that neither Chapter 405 nor Chapter 581 were unconstitutional under the Supremacy Clause or under the Contract Clause of the United States Constitution.

This decision is now subject to a motion to extend time for filing a petition for certiorari in the United States Supreme Court.

The fifth action filed in the Suffolk Superior Court by Local Division 589 against the MBTA on January 14, 1982, docket #52672, raises the issue of the effect of Chapter 581 until a new collective bargaining agreement is reached. This action is still pending.

"It is apparent from the record in this case that the entire controversy between these parties is already being adjudicated in a separate suit. To provide declaratory relief in this situation would be to transgress the limits within which the remedy is proper." *Jacoby vs. Babcock Artificial Kidney Center, Inc.*, 364 Mass. 561, 563 (1974). The present situation differs only in that the basic issues of this action are the subject of three prior actions and one later action, all of which are still pending.

"Declaratory relief can be denied or postponed where the record indicates that the 'relief will not end a controversy or is premature.'" *Municipal Lighting Commission vs. Strathos*, 13 Mass. App. Ct. 900, 901 (1982).

This petition for declaratory relief will not end the controversies, and therefore, the petition is denied.

John P. Forte, District Court Judge
Sitting in the Superior Court
by Statutory Designation

Dated: April 5, 1982

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS SUPERIOR COURT

Complaint — 45919

JOHN J. GALLAHUE, JR., ET AL.,
Plaintiffs
V.
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
Defendant

1. Plaintiffs are thirty-six individual residents of this Commonwealth of Massachusetts and employees of the Massachusetts Bay Transportation Authority (hereinafter "Authority" or "MBTA"), and members of twenty-five local unions (hereinafter "the unions") which are the duly authorized exclusive representatives of MBTA employees in collective bargaining with the Authority. Plaintiffs fairly represent the interests of all of the members of their respective unions. A list of the plaintiffs, by local union, name and address, is attached hereto, marked "Exhibit A", and incorporated herein by reference.

2. The defendant, Massachusetts Bay Transportation Authority, is a body politic and corporate and a political subdivision of the Commonwealth, with the power to sue and be sued under G.L. c. 161A, § 2. The Authority's principal office is in Boston in the County of Suffolk.

3. Each of the Unions has a collective bargaining agreement with the Authority, presently in effect and to remain in effect until at least December 31, 1980.

4. Each of the collective bargaining agreements contains a "rollover provision", which calls for it to remain in effect "from year to year thereafter unless changed by the parties hereto."

5. In addition, each of the collective bargaining agreements contains a "past practices" provision, which states that all existing practices not expressly covered therein are made part of the agreement.

6. In violation of the express terms of its written collective bargaining agreements, the Authority has failed and refused to pay cost-of-living wage increases, effective December 6, 1980, to members of Locals 6, 264 and 717. Plaintiffs are informed and believe, and therefore aver, that the Authority intends to withhold all other cost-of-living wage increases as they become due and payable under the various collective bargaining agreements.

7. In violation of the express terms of its written collective bargaining agreements, and of the seniority and past practices provisions of the agreements, the Authority is reassigning employees, who are affected by the dropping of routes, to "cover lists". Previously, such employees were afforded access to other positions, in accordance with their seniority.

8. The Authority has announced its intention to restrict employee overtime, effective January 3, 1981, in a manner which will violate the express terms of the collective bargaining agreements and the past practices provisions thereof. A true copy of the Authority's Special Order 80-106, dated December 9, 1980, on this subject is attached hereto, marked "Exhibit B", and incorporated herein by reference.

9. The Authority has announced its intention, effective January 3, 1981, to reduce the number of guards on trains of two cars or more, to less than one guard for each two cars, in violation of the past practices provisions of its collective bargaining agreements.

10. Plaintiffs are informed and believe, and therefore aver, that the Authority intends to commence contracting with third parties for goods now made and for services now provided by MBTA employees; to commence hiring part-time em-

ployees; to cease filling vacancies by means of seniority; and to exclude consideration of overtime in pension benefit payments. These proposed actions will violate the express terms of plaintiffs' collective bargaining agreements with the Authority, and the past practices provisions thereof.

11. It would be futile to require plaintiffs to exhaust the usual grievance process, because the Authority claims that its conduct and proposed conduct, complained of hereinabove, is justified and/or required by Chapter 581 of the Acts of 1980, passed on December 7, 1980.

12. The Authority's said conduct and proposed conduct is not justified or required by the enactment of Chapter 581 of the Acts of 1980. Except for its provisions relating to reduction of guards and not filling vacancies, that legislation does not authorize departures from existing collective bargaining agreements. To whatever extent the statute can be said to affect plaintiffs' present contractual rights, it is unconstitutional as impairing the obligations of contracts. United States Constitution, Article I, Section 10.

13. Plaintiffs will be immediately and irreparably injured if the Authority is not ordered to cease and desist from its present conduct, complained of hereinabove, or if the Authority's proposed conduct, also complained of hereinabove, is not enjoined.

14. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs pray:

1. For a short order of notice to defendant, to come into Court and show cause why relief hereunder should not be granted.

2. For a preliminary injunction enjoining the defendant, Massachusetts Bay Transportation Authority, its agents, servants, employees and attorneys, from disregarding or violating the express terms, including past practices provisions, of col-

lective bargaining agreements between the said Authority and its employees.

3. For a preliminary injunction enjoining the defendant, Massachusetts Bay Transportation Authority, its agents, servants, employees and agents, from refusing to arbitrate the grievances of labor unions representing its employees.

4. For a permanent injunction enjoining the defendant, Massachusetts Bay Transportation Authority, its agents, servants, employees and attorneys, from disregarding or violating the express terms, including past practices provisions, of collective bargaining agreements between the said Authority and its employees.

5. For a permanent injunction enjoining the defendant, Massachusetts Bay Transportation Authority, its agents, servants, employees and attorneys, from refusing to arbitrate the grievances of labor unions representing its employees.

6. For such further relief as may be appropriate.

By its attorneys,
DiMENTO & SULLIVAN

/s/ ____________________
James J. Sullivan, Jr.
100 State Street
Boston, Massachusetts 02109
(617) 523-5253

VERIFICATION

I, John J. Gallahue, Jr., one of the plaintiffs in the above action, certify that I have read the foregoing complaint, and all factual allegations therein are true, to the best of my knowledge and belief.

____
John J. Gallahue, Jr.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS December 24, 1980

Then appeared John J. Gallahue, Jr., and made oath to the truth of the foregoing, before me, this twenty-fourth day of December, 1980.

____

Notary Public

My commission expires: ______

COMMONWEALTH OF MASSACHUSETTS
AMENDMENT TO COMPLAINT

SUFFOLK, SS SUPERIOR COURT
NO. 45919

JOHN J. GALLAHUE, JR., ET AL.,
Plaintiffs
V.
MASSACHUSETTS BAY TRANSPORTATION AUTHORITY,
Defendants

Pursuant to the Order of this Court dated January 7, 1981, plaintiffs' Complaint is hereby amended by naming, as parties in interest, the following unions, of which the individual plaintiffs are members and whose contractual rights the individual plaintiffs seek to enforce in this action:

(a) Local No. 6, Office & Professional Employees International Union, AFL-CIO:
  (1) Clerical Unit
  (2) Adjuster Unit
  (3) Investigator and Investigator-Photographer Unit;

(b) International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 104;
(c) Local 105, International Federation of Professional and Technical Engineers, AFL-CIO;
(d) Boston Lodge 264 of District No. 38, International Association of Machinists & Aerospace Workers, AFL-CIO (Machinists);
(e) Boston Lodge No. 384, Allied Services Division, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (Towermen);

(f) Local 453, Office and Professional Employees International Union, AFL-CIO;

(g) Local Division 589, Amalgamated Transit Union, AFL-CIO (Carmen);

(h) Local Union No. 717 of the International Brotherhood of Electrical Workers, AFL-CIO;

(i) Massachusetts Bay Transportation Authority Police Association (Police);

(j) Building & Construction Trades' Council of the Metropolitan District;

(k) Alliance of Unions of the Massachusetts Bay Transportation Authority (Alliance);

(l) M.B.T.A. Starters and Inspectors Association.

By their attorneys,
DiMENTO & SULLIVAN

/s/____________________
James J. Sullivan, Jr.
100 State Street
Boston, Massachusetts 02109
(617) 523-5253

January 9, 1981

CERTIFICATE OF SERVICE

Boston, Massachusetts January 9, 1981

I hereby certify that I this day served the foregoing upon the defendant by causing a copy thereof to be mailed, postage prepaid, to its counsel of record: Joseph H. Elcock, 50 High Street, Boston, Massachusetts 02110.

/s/____________________
James J. Sullivan, Jr.